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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1197

BRYANT-BUCKNER ASSOCIATES, INC., *Petitioner,*

v.

THE DANVILLE TOBACCO ASSOCIATION, a corporation; PRODUCERS TOBACCO COMPANY INC.; DANVILLE WAREHOUSE COMPANY, INCORPORATED; *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
A. Summary recital of the basic controversy	4
B. Petitioner Bryant-Buckner's diminution of selling time under the several plans put into effect following its entrance into the market	8
C. Appointment as master of a layman who was a trade association official and who as an expert witness called by a party had already expressed opinions on the merits of the litigation	10
Reasons for granting the writ	12
Conclusion	19
Appendix A—Opinion below on first appeal, 333 F. 2d 202	A1
Appendix B—Opinion below on present second appeal	A17
Appendix C—Judgments below	A31
(1) Judgment on first appeal (No. 9136)	A31
(2) Judgment on second appeal (No. 10579)	A32

AUTHORITIES

CASES:

American Cyanamid Company v. *FTC*, 363 F. 2d 757	18
American Federation of Tobacco Growers v. *Neal*, 183 F. 2d 869	14
American Tobacco Co. v. *United States*, 328 U.S. 781	13
Amos Treat & Co. v. *Securities & Exchange Comm.*, 306 F. 2d 260	18

Page

Asheville Tobacco Board of Trade v. *FTC*, 263 F. 2d 502 ..... 12, 14, 15
Asheville Tobacco Board of Trade v. *FTC*, 294 F. 2d 619 ..... 12, 15
Associated Press v. *United States*, 326 U.S. 1 13
Bale v. *Glasgow Tobacco Board of Trade*, 339 F. 2d 281, affirming 223 F. Supp. 739 13
Bonham's Case, 8 Co. Rep. 114a 17
California v. *Federal Power Comm.*, 369 U.S. 482 14
Campbell v. *Hussey*, 368 U.S. 297 14
City of London v. *Wood*, 12 Mod. 669 17
Currin v. *Wallace*, 306 U.S. 1 13
Danville Tobacco Ass'n v. *Bryant-Buckner Associates*, 333 F. 2d 202 13
Danville Tobacco Ass'n v. *Bryant-Buckner Associates*, C.A. 4, No. 10579, decided January 25, 1967 13
Day v. *Savadge*, Hob. 85 17
Dimes v. *Grand Junction Canal*, 3 H.L. Cas. 759 17
Eagles v. *Harriss Sales Corporation*, 368 F. 2d 927 ..... 13, 15
Fashion Originators Guild v. *Federal Trade Comm.*, 312 U.S. 457 13
Gamco, Inc. v. *Providence Fruit & Produce Bldg.*, 194 F. 2d 484 13
International Salt Co. v. *United States*, 332 U.S. 392 13
In re Murchison, 349 U.S. 133 17
Rogers v. *Douglas Tobacco Board of Trade*, 244 F. 2d 471 ..... 12, 15
Rogers v. *Douglas Tobacco Board of Trade*, 266 F. 2d 636, certiorari denied, 361 U.S. 833 12
Roberts v. *Fuquay-Varina Tobacco Board of Trade*, 332 F. 2d 521, affirming 223 F. Supp. 212 and 220 F. Supp. 608 12
Scott v. *Spanger Bros.*, 298 F. 2d 928 17
Townsend v. *Yeomans*, 301 U.S. 441 13
Trans World Airlines v. *Civil Aeronautics Board*, 254 F. 2d 90 18
United States v. *United States Smelting Co.*, 339 U.S. 186 19

STATUTES: Page

Agricultural Adjustment Act of 1938, as amended 13

Federal Trade Commission Act, Sec. 5(a)(1) 3, 14

Sherman Antitrust Act, Sec. 1 .....3, 13, 14

Tobacco Control Act 13

Tobacco Inspection Act, Sec. 2 .....3, 13

7 U.S.C. § 511a 3, 13

7 U.S.C. §§ 511-511q 13

7 U.S.C. §§ 515-517 13

7 U.S.C. §§ 1311-1316 13

15 U.S.C. § 1 3

15 U.S.C. § 45(a)(1) 3

MISCELLANEOUS:

Annual Report on Tobacco Statistics 1965, U.S. Dept. of Agriculture, Consumer and Marketing Service, April 1966 (Statistical Bulletin No. 372) pp. 5, 31-35 12

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BRYANT-BUCKNER ASSOCIATES, INC., your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on January 25, 1967.

OPINIONS BELOW

The opinion of the court below on the first appeal (Appendix A, *infra*, pp. A1-A16) is reported at 333 F. 2d 202. The report of the Federal Trade Commission to the district court (BB 14-37),[1] made pursuant to the direction

[1] The record consists of the Joint Appendix on the first appeal (cited as "JA"), together with the separate Appendixes filed on the second appeal by the petitioner (cited as "BB"), by respondent Danville Tobacco Association (not cited) and by respondent Producers Tobacco Company (similarly not cited).

of the court below on the first appeal, is not reported. The opinion of the district court rejecting the Federal Trade Commission's report (BB 63-98) is reported at 250 F. Supp. 357. The opinion of the court below on the second appeal (Appendix B, *infra*, pp. A17-A30) has not yet been reported.

JURISDICTION

The judgment of the court below here sought to be reviewed (Appendix C (2), *infra*, p. A32) was entered on January 25, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether regulations of a trade association governing an interstate tobacco market that provide a system of allocating selling time under which the allocation made to qualifying warehouse space that is owned by a new member of the association is substantially less (by 15 to 25 per cent) than the allocation made to qualifying space that is owned by old members of the association constitutes an unreasonable restraint of trade in violation of Section 1 of the Sherman Antitrust Act, or an unfair trade practice in violation of Section 5 of the Federal Trade Commission Act, or both.

2. Whether the recommendation of the Federal Trade Commission (which was submitted in response to the direction of the court below on the first appeal), that the regulations to be adopted should not discriminate against a new entrant's ability to enter the market or, after getting in, to compete on an equal basis with presently established operators, was properly rejected, first by the special master, then by the district court, and finally by the court below, on the basis of "the rightfulness of a diminution of a newcomer," in this instance on the footing that to diminish a newcomer by from 15% to 25% was reasonable.

3. Whether, even in the absence of objection by the parties, the district court could properly appoint as special master in the cause a layman who had already expressed, as a witness on behalf of a party, his own opinions on the merits of the controversy; who was the executive of a trade association whose members were vitally interested in the outcome of the litigation; and who after the plan he had presented was condemned as improper by the Federal Trade Commission, then submitted a report disagreeing with the Commission, which report was approved by the district court in a judgment thereafter affirmed by the court below.

STATUTES INVOLVED

1. Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1) provides in pertinent part that—

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * *."

2. Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)) provides in pertinent part that—

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

3. Section 2 of the Tobacco Inspection Act (Act of August 23, 1935, c. 623, 49 Stat. 731) now 7 U.S.C. § 511a, provides as follows:

> **"§ 511a. Declaration of purpose**
>
> "Transactions n tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest; such transactions are carried on by tobacco producers generally and by persons engaged in the business of buying and selling tobacco in commerce; the classification of tobacco according to type, grade, and other characteristics affects

the prices received therefor by producers; without uniform standards of classification and inspection the evaluation of tobacco is susceptible to speculation, manipulation, and control, and unreasonable fluctuations in prices and quality determinations occur which are detrimental to producers and persons handling tobacco in commerce; such fluctuations constitute a burden upon commerce and make the use of uniform standards of classification and inspection imperative for the protection of producers and others engaged in commerce and the public interest therein."

STATEMENT

The severely abbreviated narrative that follows sets forth only sufficient facts to place in their setting the issues presented by this petition.

A. Summary recital of the basic controversy

This case involves the legality of the regulations under which selling time is allotted to the tobacco warehousemen on the Danville, Virginia, tobacco auction market, in a situation where the time allotted determines each warehouseman's gross earning power (JA 219a).

The background of the allocation process rests on the restriction of sales for any one day to 8800 baskets of tobacco (*infra*, p. A4; 333 F. 2d at 204). The validity of that restriction is not disputed; the controversy turns on the method employed to divide the 8800 baskets of daily sales among the several warehousemen on the Danville market.

Originally, The Danville Tobacco Association (hereinafter "Tobacco Association") operated under rules providing that each member's allocation of selling time would be its rateable percentage of the total warehouse space on the market, even though such space included areas not used for the sale of leaf tobacco at auction (JA 239a-240a; BB 26; 333 F. 2d at 204, *infra*, pp. A4-A5).

When petitioner Bryant-Buckner Associates, Inc., which had joined Tobacco Association, announced its intention of entering the market in March 1962, with a proposed warehouse containing from between 165,000 to 170,000 square feet (JA 195a, 255a), Tobacco Association adopted a new regulation whereby a new entrant would be granted, not selling time based on its rateable percentage of space, but only 40% thereof, with provisions for 15% increases annually thereafter so that it could not be up to the level of the old regulations until its fifth year (333 F. 2d at 204-205; *infra*, pp. A6-A7).

Bryant-Buckner responded to the new regulation by a proposal to enlarge its contemplated new warehouse first to 420,000, and then to 500,000 square feet, posted bond, and eventually contracted for the construction of 268,792 square feet, of which in actual fact only 168,280 have been built up to now (JA 264a-265a, 188a, 192a-194a, 258a, 419a; BB 19 n. 2).

The present litigation began as an action for a declaratory judgment, brought by Tobacco Association on the same day it adopted the new restrictive regulation, seeking a declaration that this regulation was valid; Bryant-Buckner counterclaimed for a declaration of its invalidity under the antitrust laws (333 F. 2d at 205; *infra*, p. A7).

The district court held the new regulation unreasonable, but denied Bryant-Buckner's motion for summary judgment and decreed allocations of selling time for the 1962 season under which Bryant-Buckner would receive about 85% of the selling time to which it would have been entitled under Tobacco Association's pre-1962 regulations (333 F. 2d at 206; *infra*, pp. A8-A9).

This decree by its terms was subject to further action by Tobacco Association, which approved it (*ibid.*).

Following the events just set forth, there was a reference to a master—a layman and an executive of the Bright

Belt Tobacco Warehouse Association since 1945, who had already testified as a witness for one of the parties, expressing himself as opposed to competition and in favor of restrictions on a new entrant (*infra*, pp. 10-11).

Thereafter the district court, using its 1962 allocations as a starting point, proceeded to order allocations of selling time for subsequent seasons—a permanent plan—which as as applied to Bryant-Buckner's actually built warehouse came to only 724 baskets, or 83.5 per cent of what it would have had under Tobacco Association's pre-1962 rules, and under which Bryant-Buckner could not increase its allocation by more than 8 per cent thereof in any subsequent year (333 F. 2d at 206-207; *infra*, pp. A9-A10).

Under the provisions of the permanent plan, new entrants would be subject to a 25 per cent diminution in respect of their first unit of 87,500 square feet of storage space, a 50 per cent diminution in respect of their second unit, and a 75 per cent diminution in respect of each unit thereafter. These restrictions did not apply to warehouses on the market prior to the 1962 season (333 F. 2d at 206-207).

The permanent plan (JA 130a-139a) also provides (¶ 1, JA 135a) that "all selling time shall be considered as though allocated to warehouse property and shall follow that property," but forbids transfers of selling time from any warehouse that has been on the market less than three seasons (¶ 1, JA 137a).

The district court's order adopting the permanent plan was similarly subject by its terms to approval by Tobacco Association, and, following such approval, was embodied in a final decree from which Bryant-Buckner appealed.

The court below affirmed all of the district court's interim rulings, but suspended so much of the decree as approved the permanent plan, and remanded the case with directions "to refer the permanent plan forthwith to the

Federal Trade Commission, requesting it to investigate and advise the Court upon the validity of the proposed plan or to prescribe an appropriate plan" (*infra*, p. A15; 333 F. 2d at 209).

This was done, and the Federal Trade Commission proposed modifications of the permanent plan, the substance of which was, first, that both old and new entrants should be treated on an equality, and, second, that the only warehouse space that should be considered for the purpose of allocating selling time should be space actually used for the selling of tobacco (BB 14-37). Under this plan the allotment of selling time to Bryant-Buckner would have been substantially increased, to 975.85 baskets (BB 36).

The Commission's proposals were referred to the master for comment and recommendation, the interim plan having meanwhile been approved by the district court for the 1965 selling season, after having been used also for the 1964 season (BB 38).

The master recommended that "the Danville Plan retain its present provision for diminution of a newcomer" (BB 51), saying (BB 50):

> "It is the firm opinion of the Special Master that to permit a newcomer to enter the market on a complete parity with the average established warehouse is an invitation for newcomers to come in for the purpose only of acquiring selling time for negotiation and disposition."

Accordingly, he recommended (BB 52) that the Federal Trade Commission's recommendation be not adopted, that "the recommendation of the Federal Trade Commission that there be no diminution whatever because of an entrant being a newcomer be not adopted," and that the Danville Plan be adopted as a permanent plan (BB 52). Bryant-Buckner excepted (BB 53-63).

The district court in its opinion (BB 63-98; 250 F. Supp. 357) approved the recommendations of the master, approved the Danville Plan for the 1966 and 1967 seasons and as a permanent plan, and dismissed the action (BB 99), concluding as a matter of law that (BB 97):

> "6. Diminution to a new entrant of 25% from the average selling time for a first basic unit is not unreasonable or unfair or illegal where there are, as in this case, regulations which permit gain and loss based on experience and limited to not more than 8% of any of the selling time of any warehouse in any year.
>
> "7. The limit of gain or loss because of experience in any year to 8% is not unfair, discriminatory or illegal."

On appeal by Bryant-Buckner (BB 100), the court below once more affirmed (*infra*, pp. A17-A30, A32). It sustained as reasonable the 25% diminution of the newcomer on the ground that it properly discouraged surplus building, and sustained the district court's rejection of the Commission's plan on the ground that it would be disruptive, and (*infra*, p. A28) that "A general rearrangement could also penalize warehousemen who had not contributed to overbuilding."

B. Petitioner Bryant-Buckner's diminution of selling time under the several plans put into effect following its entrance into the market

Just before petitioner Bryant-Buckner announced its intention to compete in the Danville Tobacco market, the total area of all floor space there was 1,400,451.7 square feet (JA 48a, 74a (¶ 4), among which the daily number of 8800 baskets was allotted on a rateable basis.

Bryant-Buckner then built a warehouse with 168,280 square feet (BB 19 n. 2), and the Warren firm built an additional 140,000 square feet (JA 268a). This brought the aggregate space on the Danville market to 1,708,731.7 square feet. Bryant-Buckner's percentage of this total

was 9.8482, which would have entitled it to 867 baskets under the pre-1962 rules.

The new rule adopted immediately after Bryant-Buckner announced its entry (Art. II(c) *infra,* pp. A6-A7) would have allowed it only 40% of that amount for the first year, and would have permitted an additional 15% in each of the following years, so that instead of 867 baskets it would have been limited as follows: First year, 347 baskets; second year, 477 baskets; third year, 607 baskets; fourth year, 712 baskets. Only in the fifth year would it have been back to 867 baskets.

Under the district court's interim plan for 1962, Bryant-Buckner was give 724 baskets (JA 78a, 79a).

Under the permanent plan, now approved by the court below, Bryant-Buckner continues to receive 724 baskets (JA 170a; JA 130a, ¶ 2; JA 171a-173a).

Under the plan recommended by the Federal Trade Commission but successively rejected by the master, the district court, and the court below, Bryant-Buckner would have received 975.85 baskets (BB 36).

All of Bryant-Buckner's allotments were calculated on its actual warehouse area, namely, 168,280 square feet; see district court order of July 7, 1962, at JA 94a; BB 19, n. 2; Federal Trade Commission's proposals at BB 36 and BB 37. The statement twice repeated in the second opinion of the court below (*infra,* pp. A24, A29), that Bryant-Buckner's allotments are calculated on the basis of the 268,792 square feet it has contracted to build rather than on the 168,280 square feet it has actually built, is contradicted by the cited record references.

C. Appointment as master of a layman who was a trade association official and who as an expert witness called by a party had already expressed opinions on the merits of the litigation

Respondent Producers Tobacco Company called as its witness one, Fred S. Royster, a layman (JA 292a) who had been an executive officer of the Bright Belt Tobacco Warehouse Association since 1945 (JA 281a), and who had earlier testified in many tobacco sale lawsuits (JA 304a, 305a, 313a, 471a, 472a, 475a-476a; 244 F. 2d at 473-474 note 3; 266 F. 2d at 638).

Witness Royster expressed his opposition to competition (JA 284a) and to needless building (JA 285a), and his approval of some restrictions on new warehouses entering an existing market (JA 286a-287a, 291a-292a, 294a, 296a) and of permitting the transfer of selling time from house to house within the same firm (JA 303a). He himself owns interests in tobacco warehouses that have allocations of selling time (JA 302a). He expressed the view that the market was more efficient when sales took place in fewer warehouses (JA 303a), and that a sales allotment was a property right that belonged to the particular warehouse (JA 337a-338a). Finally, he testified that he considered fair and reasonable Tobacco Association's 1962 regulation (JA 307a, 308a). (This was the regulation later struck down by the district court; JA 76a, ¶ A.)

Thereafter, without expressed objection on the record (JA 343a), the district court appointed the witness Royster "Master in this action" to conduct hearings and to make recommendations to the Court for a plan to be adopted by Tobacco Association for 1963 and subsequent years (JA 54a-55a).

Following his appointment, Master Royster returned to the witness stand for further cross-examination by counsel for the parties, when he said (JA 470a), "I don't think he [the newcomer] is entitled to share equally with the people

that are already engaged in the business, and have built up the market in coming in."

Hearings were held before the Master (JA 5a, 6a, 541a-569a), after which the recommendations in his final report (JA 110a-142a) were, subject to minor modifications only (JA 164a-166a), approved by the district court "in their entirety" (JA 166a-168a). These recommendations became the "permanent plan," briefly summarized above at page 6, the affirmance of which by the court below is now in issue.

Appointment of the witness Royster as master was sustained on the first appeal, the court below saying (*infra*, p. A13; 333 F. 2d at 208) that " 'Master' was a misnomer. In truth he did not serve as a master in the sense of being a commissioner of reference or master in chancery. • • • the Court chose him as an expert for its guidance."

Following the remand and the coming in of the Federal Trade Commission's report, the latter document was by the district court referred to Royster as "Special Master" (BB 38-39). Signing himself "Special Master" (BB 52), he recommended rejection of the Commission's plan and adoption of the permanent or "Danville Plan" (BB 52). Once again, Special Master Royster took the witness stand to testify under oath (BB 168-179). The district court then approved his recommendations in an opinion (BB 63-98; 250 F. Supp. 357) in which Royster was consistently referred to as "Special Master" (BB 63, 64, 71, 79, 83, 84, 86, 92, 93, 94, 95, 96, 97, 98), and in which his expertise was found as a fact (Fdg. 1, BB 94). And the court below, in affirming the district court's approval of Royster's rejection of the Federal Trade Commission's recommendations, similarly referred to him as "special master" (*infra*, p. A23, note 3).

REASONS FOR GRANTING THE WRIT

Nearly 70 per cent of all the tobacco produced in the United States is marketed at auction within the States comprising the Fourth and Fifth Circuits.* In no less than five separate judicially reported instances during the past decade, business units seeking to enter the tobacco marketing business in those States have been met upon entry by changes made by the local trade associations in the rules that govern the allocation of selling time among their members, changes that placed the several new entrants at a substantial competitive disadvantage in relation to the marketing concerns already in the business. Yet in no less than eight appeals by the new entrants in those five instances, what the court below on the first appeal in this case called (*infra*, p. A12) "the rightfulness of a diminution of a newcomer" has been consistently approved by both the Fourth and Fifth Circuits. *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d 471 (C.A. 5); *Rogers* v. *Tobacco Board of Trade*, 266 F. 2d 636 (C.A. 5), certiorari denied, 361 U.S. 833; *Asheville Tobacco Board of Trade* v. *FTC*, 263 F. 2d 502 (C.A. 4); *Asheville Tobacco Board of Trade* v. *FTC*, 294 F. 2d 619 (C.A. 4); *Roberts* v. *Fuguay-Varina Tobacco Board of Trade*, 332 F. 2d 521

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* *Annual Report on Tobacco Statistics 1965*, U.S. Department of Agriculture, Consumer and Marketing Service, April 1966 (Statistical Bulletin No. 372) pp. 31-35, Table 10, Sales and average prices of tobacco sold at auction, by types, State and markets, crops of 1961-65.

We have used the 1964 figures since the statistics on Kentucky and Tennessee Burley tobacco for 1965 were not available; and in respect of Maryland, where 1963 was the latest year reported, we have used the figures for that year.

The totals come to 1,471,131,000 pounds of tobacco sold in the states comprising the Fourth and Fifth Circuits, and 638,999,000 pounds in the remaining states; the precise percentage is therefore 69.7%. A map showing all tobacco auction markets and producing areas in the United States appears at p. 5 of the cited publication.

(C.A. 4), affirming 223 F. Supp. 212 and 220 F. Supp. 608 (E.D.N.C.); *Danville Tobacco Ass'n* v. *Bryant-Buckner Associates,* 333 F. 2d 202 (C.A. 4) (first appeal in this case); *Danville Tobacco Ass'n* v. *Bryant-Buckner Associates,* C.A. 4 No. 10579, decided January 25, 1967 (opinion below in this case); *Eagles* v. *Harriss Sales Corporation,* 368 F. 2d 927 (C.A. 4).

We submit that it is now time for this Court to apply to the business of tobacco marketing in interstate commerce its rule that, just as it is illegal under the Sherman Act to exclude a new entrant from interstate commerce altogether (*Associated Press* v. *United States,* 326 U.S. 1), so also is it an unreasonable restraint *per se* to foreclose competitors from any substantial part of the market (*Fashion Originators Guild* v. *Federal Trade Comm.,* 312 U.S. 457; *International Salt Co.* v. *United States,* 332 U.S. 392). That rule was applied by the Sixth Circuit to the business of auctioning tobacco in *Bale* v. *Glasgow Tobacco Board of Trade,* 339 F. 2d 281, affirming 223 F. Supp. 739 (W.D. Ky.), and by the First Circuit to the sale of produce in *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.,* 194 F. 2d 484.

First. Mention of some fundamentals will serve to simplify and to narrow the discussion that follows. This Court's decisions make it plain that the sale of tobacco is in interstate commerce (*Townsend* v. *Yeomans,* 301 U.S. 441; *Currin* v. *Wallace,* 306 U.S. 1; *American Tobacco Co.* v. *United States,* 328 U.S. 781), and Congress has not only regulated such sales since 1935 pursuant to the Tobacco Inspection Act (now 7 U.S.C. §§ 511-511q), imposing also other controls (Tobacco Control Act, 7 U.S.C. §§ 515-517; Agricultural Adjustment Act of 1938 as amended, 7 U.S.C. §§ 1311-1316), it has specifically declared that "Transactions in tobacco involving the sale thereof at auction as commonly conducted at auction markets are affected with a public interest" (7 U.S.C. § 511a, set forth in full at pp. 3-4, above).

And the court below had specifically held in an earlier decision involving Tobacco Association that this body could not lawfully exclude a new entrant from the market altogether (*American Federation of Tobacco Growers* v. *Neal*, 183 F. 2d 869 (C.A. 4)), and had in another earlier decision squarely rejected the proposition that because tobacco boards of trade operated under the authority of State law they are thereby empowered to restrain trade without regard to the prohibitions of the Sherman Act (*Asheville I*, 263 F. 2d at 508-510).

Finally, whatever may be the permissible scope of State regulation in the face of the extensive Federal legislation governing the sale of tobacco, a question on which this Court divided in *Campbell* v. *Hussey*, 368 U.S. 297, it is plain that the business of selling tobacco at auction does not transform tobacco warehouses into public utilities so that prospective entrants into the business must face the restraints inherent in the concept of public convenience and necessity. After all, "Immunity from the antitrust laws is not lightly implied." *California* v. *Federal Power Comm.*, 369 U.S. 482, 485. Consequently, as the court below held in the earlier Danville case (*American Federation of Tobacco Growers* v. *Neal*, 183 F. 2d 869, *supra*), and as the Federal Trade Commission indicated in its report in this case (BB 14-37), the legal principles governing sales of tobacco at auction are found in the Sherman Act's prohibition against unreasonable restraints of trade, and in the Federal Trade Commission Act's prohibition of unfair trade practices.

Second. The differences between the practices approved by the court below in this and other cases, and the elements of the plan proposed by the Federal Trade Commission in this case, submitted at the invitation of the court below and then rejected by it, are sharp and clear.

The court below and the Fifth Circuit have consistently held that restrictions may properly be placed on a new entrant into the market to discourage "overbuilding"

(*Asheville I*, 263 F. 2d at 511; *Asheville II*, 294 F. 2d at 622; *Rogers I*, 244 F. 2d at 481). Indeed, the court below in the ruling now sought to be reviewed has emphasized what it deems the great undesirability of upsetting the *status quo* in order to admit a newcomer to the market on equal terms (*infra*, pp. A28-A29).

Contrariwise, the Federal Trade Commission, in this case and in other rulings, has emphasized the requirement of equality of treatment (*Rogers I*, 344 F. 2d at 480-481; *Asheville II*, 294 F. 2d at 622). In this case it undertook to limit overbuilding by provisions whereby no warehouseman would be able to obtain credit for warehouse space not actually used for the sale of tobacco but that was diverted to other purposes—i.e., space "built for survival, not to sell tobacco in" (JA 452a)—and by other provisions whereby additional space after the first unit would receive less credit for selling time. But the heart of the Commission's plan was that old and new entrants were to be treated on an equality in respect of both limitations.

The Commission's concept of equality was rejected by the district court, which held (BB 95) that "The diminution to a newcomer of 25% from full average initial selling time credit is reasonable and fair," and which approved the many other provisions of the master's original permanent plan that operated to a new entrant's disadvantage (*supra*, p. 6). And the court below approved the rejection of the Commission's plan on the ground that it would be "particularly and unwarrantably disruptive at Danville" (*infra*, p. A28). Otherwise stated, the court below has approved retention of the restraints contained in the existing situation in preference to the readjustment that the commands of the antitrust laws plainly require.

Ironically enough, although the court below in the recent treble-damage case from the Wilson, North Carolina, tobacco market (*Eagles* v. *Harriss Sales Corporation*, *supra*, 368 F. 2d at 931) criticized the new entrants there because "They forewent their right to seek redress before

the Federal Trade Commission. * * * As we have previously said, the Commission rather than the courts has the expertise, the power and the implements to explore and correct unfair trade regulations," in the present case the court below deliberately rejected the Commission's expertise—which it had earlier directed the district court to request (*infra*, pp. A15, A31).

Third. The result of the petrification of the present competitive situation thus imposed on the Danville tobacco market is that petitioner Bryant-Buckner is now in a less favorable position than it would have been in had it accepted Tobacco Association's 1962 40% regulation that the district court condemned (JA 76a), condemnation never made the subject of a cross-appeal by any party. Under those provisions Bryant-Buckner would have attained to 100% by its fifth year in the market. Now, having litigated that palpably unlawful restraint, it finds itself five years later, not with 100%, but with only 83.5% of the time it should have had at the outset. Thus petitioner is now in worse case than it would have been in had it never challenged the crass and illegal restraint that was originally interposed against its entry into the market.

Fourth. Although in our view the permanent plan approved by both courts below involves on its face a violation *per se* of the antitrust laws, we cannot omit to notice that this plan was drawn, and the Federal Trade Commission's counter-proposal was recommended for rejection, by a Special Master who originally appeared as a witness for a party, who in the course of testifying had expressed opinions on the merits of the controversy, and who was then and for some 14 years previously had been the operating head of a tobacco warehousemen's trade association, in which capacity he had developed himself into virtually a professional witness (*supra*, p. 10).

Assuming that the lack of objection to his appointment and the acquiescence thereafter in his functioning amounted to express consent, it is our position that what was done

here could no more have been legalized by the consent of the parties than it could have been imposed by legislation, even by an Act of Parliament "with the common consent of the realm."

For the principle that no one may be a judge in his own cause is so fundamental that, long before any doctrine of judicial review had even been tentatively suggested, Lord Coke twice laid it down that not even Parliament could validly authorize a party to be judge in his own cause. *Bonham's Case,* 8 Co. Rep. 114a, 118a; *Day* v. *Savadge,* Hob. 85, 88 ("because even an Act of Parliament, made against natural equity, as to make a man Judge in his own case, is void in itself"). Chief Justice Holt expressed himself to the same effect. *City of London* v. *Wood,* 12 Mod. 669, 687-688 ("and an Act of Parliament can do no wrong, though it may do several things that look pretty odd; * * * but it cannot make one that lives under a Government Judge and party."). And compare *Dimes* v. *Grand Junction Canal,* 3 H.L. Cas. 759, where the House of Lords reversed the decree of a Lord Chancellor who, unbeknownst, had been a shareholder of the corporation involved in the litigation.

In the case of *In re Murchison,* 349 U.S. 133, 136, this Court said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

On the first appeal the court below rejected Bryant-Buckner's contention that the master was disqualified, saying that " 'Master' was a misnomer," and that he was simply an expert guiding the court as in other scientific cases, citing *Scott* v. *Spanger Bros.,* 298 F. 2d 928, 930 (C.A. 2) (*infra,* pp. A13-A14).

But that approach not only disregarded the fact that Royster had been specifically appointed as master *eo nomine* (JA 54a-55a), it brushed aside the more important aspect of Royster's disqualification, which was that, as an expert witness in this very cause prior to his appointment as master, he had expressed opinions on the merits of the controversy (*supra*, p. 9).

In the recent case of *American Cyanamid Company* v. *FTC*, 363 F. 2d 757, the Sixth Circuit set aside the order of the Federal Trade Commission because its chairman had earlier participated as counsel to a congressional committee in the same controversy that later came before him as a member of the regulatory agency. Similarly, the District of Columbia Circuit has set aside administrative orders where a member of the agency had earlier been counsel or investigator in the identical proceeding. *Amos Treat & Co.* v. *Securities & Exchange Comm.*, 306 F. 2d 260; *Trans World Airlines* v. *Civil Aeronautics Board*, 254 F. 2d 90.

The principle governing all of these decisions is that one who has been or has represented a party may not thereafter sit in judgment. Accordingly we submit that it was here similarly improper, to the extent of vitiating the proceedings, for an expert witness who had expressed opinions on the merits of a controversy on behalf of a party thereafter to sit as master and in that capacity to prepare a plan for resolving that controversy.

We have already indicated that we deem the permanent plan drawn by him offensive to the antitrust laws regardless of its authorship. But we think this Court may also wish to review the procedural aspects of this case, wherein the regulation formulated by the Federal Trade Commission by reason of an invitation initiated by the court below was rejected in favor of another plan drawn by the head of a trade association, who had earlier testified as a witness, and where the ex-witness as master then successfully recommended rejection of the Commission's plan.

Fifth. Simply to show that the point has not been overlooked, we note that the first judgment of the court below directed a remand and a reference to the Federal Trade Commission (Appendix C(1); *infra,* p. A31); it was therefore not a final judgment. Consequently all of the points raised on the first appeal to the court below remain open now on review of the second appeal. *United States* v. *United States Smelting Co.,* 339 U.S. 186.

CONCLUSION

The decision below effectively immunizes a large percentage of the country's sales of tobacco by auction from the prohibitions of the antitrust laws against unreasonable restraints of trade and unfair trade practices. More than that, the ruling below rejects the views of the Federal Trade Commission, which it had invited, in favor of those of a special master who had earlier expressed opinions on the merits of the controversy as an expert witness on behalf of a party. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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MARCH 1967.

APPENDIX A

OPINION BELOW ON FIRST APPEAL, 333 F.2d 202

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9136.

THE DANVILLE TOBACCO ASSOCIATION, a corporation, et al.,
Appellees,

versus

BRYANT-BUCKNER ASSOCIATES, INC.,
Appellant,

and

THE DANVILLE TOBACCO ASSOCIATION, a corporation, et al.,
Appellees,

versus

PRODUCERS TOBACCO COMPANY, INCORPORATED,
Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT DANVILLE.
TED DALTON, DISTRICT JUDGE.

(Argued January 14, 1964. Decided May 14, 1964.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and BRYAN, Circuit Judges.

Frederick Bernays Wiener (I. Murchison Biggs and Robert F. Ward on brief) for Appellant Bryant-Buckner Associates, Inc.; G. Kenneth Miller (Earle Garrett and Allan Garrett on brief) for Appellant Producers Tobacco Company, Incorporated; Edwin B. Meade (Meade, Tate and Meade on brief) for Appellees; and John W. Carter and C. Stuart Wheatley (Talbott, Wheatley & Talbott; and Carter and Carter on brief) for W. Townes Lea and Louis W. Love, Partners Trading as Piedmont Warehouse and Hughes Warehouse, and Neal's Warehouses, Incorporated.

ALBERT V. BRYAN, Circuit Judge:

Bright leaf tobacco sales at public aution are conducted in the Danville, Virginia marketing area in warehouses operated by members of the Danville Tobacco Association (Association) which brought this action in the District Court seeking a declaratory judgment upon the validity, apposed the Federal antitrust statutes, of its plan for allotting selling time during the 1962 season among the warehousemen. The defendants were members of the Association. The plan was stricken down as illegal on the opposition of two of the defndants, but this appeal is prosecuted by them to further decrees declaring valid a temporary assignment plan for 1962 and 1963 and a permanent plan for subsequent seasons.

Appellant Bryant-Buckner Associates, Inc. (B-B) contends that these determinations were irregularly reached, that the plans were violative of the antitrust laws in that they permitted an unreasonable restraint of trade, and that the District Court exceeded its authority by ruling upon the general fairness of the plans in advance of their enforcement. Producers Tobacco Co., Inc. (Producers) appeals on the ground that the plans do not provide adequate protection against improper tactics of members and do not give a member credit for past performance.

We affirm the District Court insofar as it concluded that the temporary 1962-1963 plan did not embrace any breach of the antitrust statutes. We suspend provisionally the order establishing the permanent plan, and remand the action with directions to the District Court to seek the advice of the Federal Trade Commission upon the validity and administration of the permanent plan. While procedures in the District Court departed from the conventional course, no injustice resulted. However, except upon the antitrust phase, we think the District Court should not have ruled upon the plans prior to their application. Nevertheless, as the plans for 1962 and 1963 have been executed without contravening the antitrust laws, we have no occasion to review their general fairness.

The production and sale of tobacco since colonial times has been impressed with a public interest and subject to governmental control. Hening's Statutes at Large, A Collection of all the Laws of Virginia, Vol. IV, Chap. VII, p. 91 (1720) and Vol. IX, Chap. X, p. 482 (1778); 1951-52 Virginia Cavalcade, Vol. 1, No. 1, p. 39, *Some Called It Treason* by William H. Gaines, Jr. (Virginia tobacco planters in spring of 1682 rebelled in an effort to gain crop control). Moreover, the nature of flue cured bright tobacco, together with other economic factors, has also made it imperative that sales be regulated.* Tobacco in Southeast United States is grown in geographical belts. It ripens first in the southernmost of them and, of course, each year's marketing commences there. This process progresses northwardly by seasons until the fifth and last belt, including Virginia, is reached in September.

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* For more instructive accounts of the preparation and sale of Tobacco, see American Federation of Tobacco Growers v. Neal, 183 F. 2d 869 (4 Cir. 1950); Rogers v. Douglass Tobacco Board of Trade, 244 F. 2d 471, 473 n.3 (5 Cir. 1957), 266 F. 2d 636, *cert. denied*, 361 U.S. 833 (1959); and report of the master in the present case.

As the growers bring their tobacco to warehouses for sale, the warehousemen have found it wise to prescribe uniform rules for governance of the sales. To this end, they founded an organization known as the Bright Belt Warehouse Association. It does not prescribe local rules for any market but deals solely with general directions relating to the ascertainment of the harvest periods for each belt, the hours of sale, the number of buyers and the quantity of tobacco to be sold daily. The propriety and legality of these regulations are not in dispute, the character of the business admittedly necessitating them.

The Bright Belt Warehouse Association has declared that no more than 400 baskets of tobacco should be sold per hour and that daily sales be confined to 5½ hours. These limitations are compelled by the inability of a buyer to bid intelligently upon a greater quantity or for a longer period. Thus for one day the sales would be restricted to 2200 baskets (400 x 5½). Four buyers, assigned to the Danville market by each major tobacco company, permit four auction sales to be conducted contemporaneously, so that a maximum of 8800 baskets (4 x 2200) can be sold daily.

With the supply of tobacco about constant and sales hours and buyers defined, the question arises how each day's selling time shall be prorated among the warehouses. This problem germinates from the obligation to avoid loss to the producers through failure to sell all the tobacco they have brought to the market on a given day. When auctioned the tobacco has been cured, dried and moistened. Once taken from the pack house for sale, it will easily crumble and spoil unless soon redried. Obviously, no more should be offered than can be dried off within the stipulated period.

For some years previous to 1962 the selling time permissible at Danville had been divided among the warehousemen on the basis of the ratio of the floor space of their respective warehouses to the total market floor space. This system had serious defects, but none more menacing than

the increase of floor space not to meet a need but to enlarge a warehouse's proportion of selling time. Continued uneconomic overbuilding as well as the general advantage of cooperation among the warehousemen, farmers and buyers brought about The Danville Tobacco Association, plaintiff-appellee.

The General Assembly of Virginia chartered the Association by a special act on March 8, 1888, as a non-stock, non-profit corporation, its membership to consist of warehousemen, buyers and rehandlers of leaf tobacco. It was created "for the purpose of encouraging, promoting and regulating the sale of leaf tobacco and trade therein in the town of Danville, Virginia, so far as the same may be done under and in accordance with the laws of this commonwealth." The corporation was authorized "to make all necessary rules and by-laws as a majority of its members may deem proper for the promotion of its objects and the purposes of its incorporation."

In early February 1962, B-B joined the Association. Its warehouse, together with a new one constructed by an existing member, raised the total to 17 on the Danville market. Newspapers had announced that B-B would request an apportionment of time on the basis of approximately 165,000 sq. ft. At the next annual meeting of the Association, February 20, 1962, after a discussion on the disruption of allocations by additional warehouses, the gathering was adjourned until March 12, 1962. The governing board was directed in the interim to "consider a plan for an equitable method of allotting settling time on this market, designed to avert the building of excess floor space presently or in the future."

At the adjourned meeting a proposal for a floor space allocation was offered and adopted; only B-B and another dissented. The new resolution so far as pertinent recited and provided as follows:

> "WHEREAS, the existing warehouse space in Danville is eight times that needed to sell the average

crop on this market and it is deemed essential at this time that some fair and reasonable means be followed which will reasonably regulate the construction of additional excess warehouse space by member owners of warehousemen and those who may build new warehouses and who may apply for membership in the Association and an allotment of selling times on the Danville market;

* * *

"Now, Therefore, Be It Resolved . . . as follows:

ARTICLE I

"(a) For the selling season of 1962 each owner or operator of a warehouse on the Danville market shall be allotted the same selling time or basket space allotted to his warehouse during the 1961 selling season, subject to such adjustment as may be required under Article II hereof. This basis of selling time shall continue in the future as the owners or operators of warehouses during the selling season of 1962, subject only to adjustments required aforesaid.

* * *

ARTICLE II

* * *

"(b) A *new warehouse member of the Association who has constructed a new warehouse* and *an old warehouse member who has constructed a new warehouse* or a new addition to an existing warehouse shall be considered alike in the allotment of selling time or basket space to such new construction.

* * *

"(c) Said *new warehouse member* or said old warehouse member who shall apply for an allotment of selling time or basket space for his new construction shall receive that *fractional part of the over-all selling*

time on the Danville market *as the square footage of such new construction may bear to the total square footage* of all warehouse floor space including such new construction on the Danville market, *but only forty (40%) per cent of such new allotment may be used by the owner or operator of such new construction during the first season of said allotment.* Thereafter said owner or operator of new construction shall be allowed for *each successive selling season an additional fifteen (15%) per cent of his allotted time during each successive selling season for a total of four (4) seasons,* and thereafter the full allotment made to him prior to his first selling season will continue, subject to such adjustments as may be required to allow selling time to owners or operators of subsequent new construction on the Danville market." (Accent added.)

All of the old concerns, except the one which had added a new warehouse, sought selling time on the basis of their 1961 share. B-B filed a written application for 420,000 sq. ft., more than one-third of the existing market floor space. Acknowledging its original request was for only 165,000, B-B explained the expansion was attributable to the 40% reduction for new construction made by the recent regulation. It also informed the Association of its intention to litigate the validity of the limitation. B-B later enlarged the application to 500,000 sq. ft., posting a cashier's check of $10,000.00 by way of a performance bond.

On the day the Association adopted the resolution it filed the complaint in this case. B-B answered seeking a counter declaration to the effect that the new regulation violated the antitrust laws. Appellant Producers lodged an answer, counterclaim and crossclaim, denying the reasonableness of the regulation, asserting that any apportionment based on floor space was unjust, and praying the Court to promulgate a plan for the Association which would be a fair division

of selling time. At the trial in May 1962, the Court gave every party an opportunity to be heard on the validity of the resolution and upon the general question of what would constitute a lawful program for sharing the selling time.

On June 16, 1962 the Court handed down its findings of fact, conclusions and order. It declared the resolution of the Association adopted in its March 12, 1962 meeting "not in accordance with the law and . . . unfair and unreasonable". However, the motion of B-B for the Court to proceed no further than the declaration of the resolution's invalidity —that it completely fulfilled the purpose of the suit—was denied. Instead, the Court outlined an acceptable plan for 1962.

The order portioned out the selling time by this formula: the entire warehouse floor space of the 1961 Danville market, comprising 1,400,450 sq. ft., was divided by the number of warehouses, then 16, reaching an average size of 87,527 sq. ft. This became the unit of space. With the addition of 140,000 sq. ft. added by the old member and 268,792 asked by B-B the total became 1,809,242. Division of this new total by the unit of 87,527 gave approximately 21 units. This meant that each unit carried with it 419 baskets (8800 divided by 21).

Following substantially a schedule proposed by appellant Producers, a new entrant was awarded credit in full (419 baskets) for the first unit, 50% thereof for the second unit, and 25% for the third unit. B-B had contended it was bound by a construction contract to build a warehouse of 268,792 sq. ft. Later this claim was reduced to 165,000, the Court believing this area adequate in view of the fact that 400,000 sq. ft. had been quoted as sufficient to accommodate the entire market sales. This was done with the consent of B-B. However, in applying the formula the larger floorage was used.

With 268,792 sq. ft., B-B was allowed a full credit or 419 baskets on the first unit of 87,527 sq. ft., 210 on the

second, and 105 on the third, an aggregate of 734. Slight adjustments resulted in a final figure of 724. After deduction of this number and the disallowance of an additional quota asked by the old member on the basis of its new construction, the remainder of the basket-maximum was distributed on the floor space percentages of 1961.

The order of June 16 also called a meeting of the Association on June 27, 1962 "for the purpose of considering and acting on the allotment of selling time made in this decree". On that occasion the quotients projected by the order were adopted by the Association as its own for 1962.

Meanwhile, on May 12, 1962, the Court appointed a master "to report to the court upon findings of fact and conclusion as to the issues presented herein, and particularly a formula for the allotment of selling time for the tobacco warehouses in the Danville area for 1963 and succeeding years". This order was passed with "all parties represented by counsel agreeing thereto". It was understood that the master would not consider a project for 1962. No evidence was taken by him; indeed, no evidence was received by the Court after the decree of June 16, 1962. In consequence, the master was left to draw his report from the proceedings culminating in the June decree, all of which he attended.

After discussing the modus operandi of tobacco marketing and the operations at Danville, in late 1962 the master recommended for 1963 and subsequent years the well-known and approved experience or performance plan with modifications. Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502, 506 (4 Cir. 1959); Rogers v. Douglas Tobacco Board of Trade, 244 F.2d 471, 478 (5 Cir. 1957). This, too, had been sponsored by appellant Producers. Under the modified version of this theory the grant of selling time is gauged for each year upon the ratio of the respective sales of the warehousemen in the preceding year to the total sales, with a proviso that a change in

selling time of a warehouse will not vary beyond a certain percentage of its selling time in the preceding year. Some reduction is introduced in giving time to a new warehouseman.

By a supplemental report the master advised that application of the experience system be delayed until the 1964 season. His reason was that as the warehousemen had not known in 1962 that their performance would bear upon the 1963 distribution, the use of the 1962 experience would not be a fair foundation for the 1963 distribution. He thought it would be fairer to look to the 1963 experience for the first measurement. Accordingly, he suggested that the temporary plan of 1962 be carried into 1963.

The report as supplemented was confirmed by the Court on January 30, 1963. A meeting of the Association was called by the order to consider the permanent plan approved by the Court for 1964 and the following years. Adoption of it as the Association's was voted. In turn the Court on March 16, 1963 ratified the action of the Association.

I. The decree of June 16, 1962 answered the primary prayer of the complaint, that is for an adjudication upon the validity of the Association's resolution of March 12, 1962 which cut the share of newcomers to 40% of average space for the first year. It found the resolution unreasonable and unfair, and thus incompatible with antitrust proscriptions. No exception or appeal was taken to that portion of the order.

The Association had refrained from enforcing the resolution until its legality was adjudicated. Hence it never became a restraint upon trade. Actually, it was no more than the publication of a by-law passed subject to review by the Court. We hold the adoption of the resolution was not a breach of the antitrust enactments.

II. Doubtlessly, the "such other further and general relief prayer" of the complaint warranted the District

Court in retaining the cause, to plan for the 1962 season, at the instance of the Association and its members, although B-B later withdrew assent. We do not disapprove the denial of B-B's motion to terminate the suit immediately upon annulment of the resolution of March 12, 1962. No matter how circuitously, in the end the Association did adopt and submit the 1962 plan to the Court. The inquiry of the Court, nevertheless, should more advisedly have been limited exclusively to the issue of whether the plan transgressed the Federal acts.

To begin with, that was the aim of the suit. Moreover, the District Court was not equipped to formulate or adjust a future conception of this sort. It could not readily project a general scheme and direct its operation; it is geared to make adjudications on points as they arise from a practiced design. Instantly, the 1962-1963 and permanent plans were matters essentially within the internal economy of the Association. They should have been written or erected initially under its own procedures with guidance, if need be, from an appropriate and expert administrative agency. At best, after determining ex facie the legality of a submitted method, the Court ought only to retain jurisdiction for solution of such antitrust or related, germane and pendent questions as might arise in its implementation.

Nor do we have facilities for framing a selling time system, or for determining whether it is generally equitable or how it should be reformed to make it fair. However, as the 1962-1963 plan has already been acted upon, no order at this time could rescind or otherwise affect those acts. We can only express a judgment upon the right or wrong of the District Judge's decision on the legal theme of the petition: whether the 1962-1963 plan as drawn and effectuated was free of antitrust taint. We do not hold he was wrong.

The facts we have chronicled comprise the findings of the District Judge together with such other facts as are

relevant and uncontroverted. Indeed there is little factual conflict. B-B's allotment of 724 baskets is not without support. Dividends of selling time in a tobacco market, it is conceded, cannot be set apart with precision.

B-B attacks the fairness of its allotment in comparison with the share of baskets it would have received under the floor space plan prevailing in early 1962 when it joined the Association. In this it avers that the total floor space in consideration was then about 1,705,000; B-B's claim for 165,000 was approximately 9.6758% of the whole; and the same percentage of the maximum 8800 baskets is 851. In getting 724 instead of 851, B-B complains it is reduced to 85% of its entitlement under the pre-March 1962 rules.

A reduction of 127 baskets, (851 less 724) or 14.93%, has not been proved to be an unreasonable restraint for a new entry in the market. Experts for both sides recognize the rightfulness of a diminution of a newcomer. The record warrants the conclusion that a just tolerance would permit a decrease of his share initially to the formula followed in this case, to-wit, a full quota for the first unit, 50% for the second and 25% for the third. This court has sanctioned a less-than-average time allowance to a fresh entrant. Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502, 511 (4 Cir. 1959); Asheville Tobacco Board of Trade, Inc. v. FTC, 294 F.2d 619, 625 (4 Cir. 1961). It must be remembered that this plant was only transitory, giving adequate time for preparation of a permanent arrangement.

Our agreement with the District Judge that the temporary plan is innocent of antitrust guilt is placed on the statute's terms. No unjust combination, conspiracy or monopoly is discernible. Rather, there was a bona fide and diligent effort to permit fair and just trading on the Danville Tobacco Market. The Association was in effect a board of trade seeking an equitable adjustment among the warehousemen of the constants of supply, selling time and buyers, all of which had been lawfully fixed. American

Federation of Tobacco Growers v. Neal, 183 F.2d 869, 870 (4 Cir. 1950). All of its members, as the pleadings reveal, were quite sensitive to antitrust policy. The suit's very object was to tailor the Association's floor space regulation to a pattern coming within these statutes.

Of course, there was some restraint of trade, but what was done was done from unimpeachable motives and under the aegis of the District Court. This is a factor to be weighed in assaying the reasonableness of the restraint. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). In fine, we are not convinced it was excessive. Asheville Tobacco Board of Trade, Inc. v. FTC, *supra,* 263 F.2d 502, 511.

III. To impeach the decrees, attack is mounted by B-B upon the ground that the master appointed by the District Court was unqualified and disqualified. The argument is utterly unsound. It wholly misconceives his place in the suit. Besides, the appointment was made with the full knowledge and consent of B-B, even to the selection of the person to be master. True, he was not a lawyer, but the Federal Rules of Civil Procedure contain no such requirement. Rule 53(a).

He was an official of the Bright Belt Warehouse Association who had testified in the case before his appointment and who testified thereafter. If B-B may object despite its contrary representation to the Court, still there was no error in his appointment and service. "Master" was a misnomer. In truth he did not serve as a master in the sense of being a commissioner of reference or master in chancery. He did not take evidence; he did not resolve any factual disputes; he made no rulings of law. Impressed with his marked knowledge in tobacco marketing, demonstrated in his testimony, the Court chose him as an expert for its guidance. He was subject to questioning as a witness before and after his counseling advice to the Court. Rightfully, and with every propriety, he expounded to the Court and the parties the techniques of the subject in suit.

It is a practice frequently resorted to in litigation, especially in patent and scientific cases. See Scott v. Spanger Bros., Inc., 298 F.2d 928, 930 (2 Cir. 1962). Incidentally, he served without compensation and even enlisted the aid, on the same basis, of a competent and disinterested attorney to help him propound his views. All of this was known to the Court and to every party, without the slightest reservation by any of them, including B-B.

The aspersions deliberately directed at the master in the briefs of B-B's counsel, attempting to impugn his motives, and the disparaging references to the trial judge, are entirely unfounded. We deplore such tactics and condemn them.

IV. The permanent plan approved for 1964 and subsequent years adopted generally, as noted, the experience system. It provides for allotments on the unit basis. Each warehouse area of 87,500 sq. ft. will be considered a unit. Twenty-one (21) units have been found in the Danville market. The total selling time of 8800 baskets will be apportioned among the 21 units equally, except a new member will be awarded selling time at the rate of 75% for his first unit, 50% for his second unit and 25% for subsequent units. An 8% gain or loss limitation annually upon the selling time is included, based on the total selling time of the particular warehouse. The authorities approve a restriction of this kind when reasonable. Asheville Tobacco Board of Trade, Inc. v. FTC, *supra,* 263 F.2d 502, 511; Asheville Tobacco Board of Trade, Inc. v. FTC, *supra,* 294 F.2d 619, 629 (4 Cir. 1961).

Heretofore we have indicated the inaptitude of a court's machinery to prescribe and administer a prospective plan, such as that required for the operations of a tobacco market. It is a matter requiring a fluidity of procedure and an expertise not possessed by courts. Inasmuch as the Association is performing a governmental function, it seems meet

and right to seek the advice of the Federal Trade Commission in the instant controversy. That body has the procedural adaptability and a familiarity with the subject necessary to consider and adjudge the workability and legality of a plan for the Association. Accordingly, we will suspend pro tempore so much of the decree of the District Court as finally approves the permanent plan, and remand the cause with directions to the Court to refer the permanent plan forthwith to the Federal Trade Commission, requesting it to investigate and advise the Court upon the validity of the proposed plan or to prescribe an appropriate plan. See Rules of Practice, Federal Trade Commission, 16 C.F.R. § 1.11, 15 U.S.C.A., following § 45 (1963 Supp.). See United States v. R.C.A., 358 U.S. 334, 346-52 (1959); Note, 51 *Harv. L. Rev.* 1251, 1253 (1938); FTC v. Morton Salt Co., 334 U.S. 37, 54 (1948); FTC v. Cement Institute, 333 U.S. 683, 726 (1948).

In the event the Federal Trade Commission is unable to complete its study before the commencement of the 1964 selling season, the Danville market should be permitted for that year to proceed on the basis of the permanent plan. In the circumstances and on the present record, it does not appear to us to be such an unreasonable restraint of trade as to preclude its utilization until further exploration and study of the problem can be consummated.

V. The appeal pressed by Producers poses questions of management, direction and regulation of the auction sales as well as equitableness of the plans. The first point pertains to the discipline and administration of the Association. This grievance must be submitted to the governing body of the Association before resort to the courts is in order. The general fairness of the plans, as we have observed, was an analysis not appropriate for the Court.

The orders of the District Court entered in regard to the 1962-1963 selling seasons are affirmed, the orders in

reference to the selling seasons of 1964 and subsequently are suspended and the action remanded for proceedings consistent with this opinion. The District Court should retain jurisdiction of the cause for such further orders as may become requisite in the final settlement of the controversy.

Affirmed in part and remanded with directions

APPENDIX B

OPINION BELOW ON PRESENT SECOND APPEAL

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,579.

THE DANVILLE TOBACCO ASSOCIATION, a corporation; PRODUCERS TOBACCO COMPANY, INCORPORATED; W. TOWNES LEA and LOUIS W. LOVE, partners, trading as Piedmont Warehouse and Hughes Warehouse; NEALS WAREHOUSES, INC., Jack L. Neal and George A. Myers, Jr., T/A Growers Warehouse; and LATANE MOTLEY and BLAIR MOTLEY, JR., and JOHN W. MOTLEY, Executors of the Estate of Blair Motley, Deceased, T/A Motley's Warehouse, and DANVILLE WAREHOUSE COMPANY, INCORPORATED,
Appellees,

versus

BRYANT-BUCKNER ASSOCIATES, INC.
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT DANVILLE.
TED DALTON, CHIEF DISTRICT JUDGE.

(Argued October 31, 1966. Decided January 25, 1967.)

Before BRYAN, BELL and WINTER, Circuit Judges.

I. Murchison Biggs (Robert F. Ward on brief) for Appellant, and Edwin B. Meade (Meade, Tate and Meade on brief) for Appellees The Danville Tobacco Association and Danville Warehouse Company, Incorporated; C. Stuart Wheatley (John W. Carter; Clement, Wheatley, Winston & Craig, and Carter and Carter on brief) for Appellees W. Townes Lea, et al.; John W. Carter (C. Stuart Wheatley; Clement, Wheatley, Winston & Craig, and Carter and Carter on brief) for Appellees Neal's Warehouses, Incorporated et al.; and G. Kenneth Miller (Allan Garrett; Earle Garrett, III; Garrett, Garrett and Smith, and May, Garrett, Miller, Newman & Compton on brief) for Appellees Producers Tobacco Company, Incorporated.

ALBERT V. BRYAN, Circuit Judge:

Apportionment of selling time among the warehousemen on the Danville, Virginia tobacco market, comes here again as an alleged affront to the Sherman Antitrust Act.[1] It is a second appeal in the original suit with which we dealt in Danville Tobacco Association v. Bryant-Buckner Associates, Inc., 333 F2d 202 (1964).

In accordance with our suggestion on remand, the District Court asked the Federal Trade Commission to advise it upon the validity of an apportionment system known as the "permanent plan" and approved by the District Court for use beginning with the 1963 season, or to prescribe an appropriate scheme if the permanent plan were found objectionable. In our opinion in 1964 we approved, as a transitory measure, an interim plan approved by the District Court for 1962 which gave defendant-warehouseman Bryant-Buckner Associates (B-B) a diminished selling-time as a new entrant (in 1962) into the market.

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[1] 15 USC § 1 et seq.

This interim plan was incorporated into the permanent plan, which we permitted to operate pro tempore pending the report of the Commission. In its response, the Commission found the permanent plan less than "reasonable, fair and equitable", and devised a wholly new formula.

However, the District Court rejected the Commission's scheme and declared the permanent plan to "constitute a proper and legal manner of allocating selling time both as to the warehousemen now on the Danville market and as to a new entrant". B-B now appeals from this ruling. We affirm.

The knot of this controversy is the validity of the constriction placed upon the share allotable to a new warehouseman in the total daily selling time of the market. These restraints were written into the regulations of the Danville Tobacco Association, a membership, non-profit corporation created by the Virginia legislature "for the purpose of . . . regulating the sale of leaf tobacco and trade" in Danville. All of the company buyers and warehousemen, including B-B, are members. The "selling time" of a warehouse is its portion of the total tobacco—here 8800 baskets—that may be sold each day on the market. The rules of the Bright Belt Warehouse Association[2] and the Danville Tobacco Association stipulate that the daily sale period cannot exceed 5½ hours, and must proceed at a rate of not more than 400 baskets per hour for each of the four buying teams.

This suit was commenced by the Association immediately after the admission of B-B to membership in February 1962. Naming all warehouse members as defendants, it sought a declaratory judgment upon the legality under the antitrust

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[2] For a description of the marketing of bright leaf tobacco generally, and specifically of the operation of the Danville market, see Danville Tobacco Assoc. v. Bryant-Buckner Associates, Inc., supra, 333 F. 2d 202, 204 (4 Cir. 1964) and citations therein. See, also Eagles v. Harriss Sales Corporation, 368 F. 2d 927 (1966).

laws of an initial plan, and when it was condemned, the permanent plan was submitted by the Association for a like ruling. Danville Tobacco Assoc. v. Bryant-Buckner Associates, Inc., supra, 333 F2d 202, 209.

The permanent plan purports, in brief, to allocate selling time on the basis of the proportion of the floor space in each warehouse to the total floor space on the market. Any member is entitled to increase its allotment upon showing that its sales for the previous year exceeded its allotment. A gain or loss, however, cannot go beyond 8% of a preceding year's allotment. In addition, special limitations are placed upon new entrants, that is those joining after 1962.

In the District Court's decree now on review, the permanent plan is set forth in full, the now-pertinent parts of it reading:

> "8. *The Modified Experience System and Adjustments To Be Made as a Result of Fair Competition*
>
> "1. A warehouse unit on and in the Danville Market is identified as a building which is suitable in every respect for selling leaf tobacco at auction in an efficient manner, and which is available therefor, and which is in compliance with the requirements of the Danville Tobacco Association Rules and Regulations relating to the construction and maintenance of tobacco sales warehouses. Provided that the requirement as to 'available therefor' shall be satisfied if it is determined, on the day when the allocation of selling time is made for an approaching season, that the warehouse is available for that season; and provided, further, that the requirements as to 'available' shall not apply to any warehouse which, on September 10, 1962, was under an uncancellable lease, until said lease shall have expired. Each warehouse area measuring 87,500 square feet shall be considered a unit and any proportionate part thereof shall be considered that percentage of a unit. At the time of the opening of the 1962 Danville

Market there were on the market 21 such units. (This includes three units for Bryant-Buckner . . . .)

2. Original selling time is that which existed for each tobacco warehouse on the opening date of the 1962 Danville Market.

"3. Selling time for the 1963 season shall be the same as that for the 1962 season, subject only to such adjustments as may become necessary by reason of the admission of new warehouses, additions to existing warehouses, withdrawals, transfers, leases and mergers, as hereafter provided in these rules and regulations. Beginning with the year 1963 adjustments of selling time for competitive gains or losses shall be made at the end of the 1963 season so as to reflect the valid and credible experience of each warehouse to which selling time was allocated in 1963, such adjustment to be made on the basis of producers sales in pounds plus bona fide resales. . . . No warehouse shall gain or lose, at the end of the season, more than 8% of the selling time which it had during that season. . . . . Similar adjustments shall be made at the end of each season thereafter.

. . . . . .

"8B. *The Admission of New Warehouses and Additions to Existing Warehouses*

"1. A 'new unit' is a warehouse constructed after the market opening of 1962, containing 87,500 square feet of floor space available and suitable for warehouse operations as defined above, whose owners and operators shall be independent of the ownership and operations of any other warehouse facilities on the Danville Market. . . .

"2. An 'added unit' is warehouse space of 87,500 square feet suitable and available for warehouse operations in Danville, either an addition to an exist-

ing warehouse or a new structure, which does not qualify as a 'new unit' as defined above.

"3. 'New units' and 'added units' and fractional parts thereof entering the Danville Market in 1963 shall receive allocation of selling time as follows:

"3a. Prior to the second Tuesday in March, 1963, there shall be computed the number of 'new units' of 87,500 square feet and the number of 'added units' of 87,500 square feet (provided that new construction or added construction of less than 87,500 square feet shall be treated as a fractional unit), and to the sum of those units there shall be added the number of units remaining from the 1962 season. The total available selling time shall then be divided by the total number of units. The result is a 'unit selling time.'

"3b. To each 'new unit' there shall be allocated, for the 1963 season, selling time equal to 75% of the unit selling time.

"3c. As 'added units' are built, either new buildings, additional floor space in new units, or additions to existing buildings, the computation of additional selling time for such 'added units' shall be made after giving full consideration to the units of floor space to which the 'added units' attach, or with which they unite in common ownership or operation . . ., and the computation of additional selling time for such 'added units' shall be made as follows:

"(1) For 87,500 square feet of available warehouse space added to a new or to an existing unit of 87,500 square feet, there shall be allocated 50% of a unit selling time.

"(2) For each 87,500 square feet of warehouse floor space added to 175,000 square feet or more of warehouse floor space under common owner-

ship or management . . ., there shall be allocated 25% of a unit selling time.

"4. For each year following the year 1963, the allocation of selling time to new and added units and the handling of withdrawn units shall follow the rules above prescribed for such handling in the 1963 season.

"5. Whenever it becomes necessary to provide selling time (as reflected by baskets) to a new or an added unit, such selling time shall be taken from existing warehouses in proportion to their selling time."[3]

In the effectuation of this pattern a newcomer is first assigned its share under the plan, and the remaining selling time is then distributed among the older warehouses pro rata—in the proportion of the prior year's holding of each of them.

For its own plan the Commission used 87,500 square feet —the average size of the warehouses—as a space-unit measurement for the allocations and 8% as the gain or loss limitation. However, it thought the restriction of a new member to less selling time per space-unit than that allowed the older warehouses was inimical to the antitrust statutes, as constituting an unlawful restraint upon an outsider.

The plan put forward by the Commission placed a new warehouse upon an equality with the older warehouses in the allocation of selling-time. It would grant each warehouse, new and old alike, one credit-unit (a selling-time unit) for the first 87,500 square feet of floor space. For the next 87,500, each would receive a credit of 75% of a

[3] On the special master's later recommendations, reflecting his awareness that the warehousemen had entered the 1962 season unaware that their performance could alter their subsequent allotments, the implementation of the experience adjustment system was delayed until 1964 in order that its first allotment adjustments would reflect 1963 sales statistics.

unit. For the third 87,500 a credit of 50% would be given, and for a fourth a credit of 25%. The total available baskets—8800—would then be apportioned among the warehouses in the proportion that the total credit-units of each warehouse bore to the aggregate of such units on the market.

I. Before considering the District Court's discard of the Commission's plan, we turn to B-B's attack upon the Court's final approval of the permanent plan as embodying a fair and reasonable pattern for allotment of selling time to a new entrant. Throughout this discussion it must be recalled that B-B's allotment was initially fixed by the interim plan employed for 1962, and that it was taken into the permanent plan as it became effective in 1963.

Because of this origin, B-B's allocation was never subjected to the 75% reduction on its initial 87,500 as required by the permanent plan. B-B was accorded much more. In its application for membership in February 1962 B-B first stated it would build 420,000 square feet, then it said 500,000, and then 268,792, of storage space. Actually it built 168,000. Nevertheless, in the interim plan, *and ever since,* the Association has allowed it selling-units for 268,792. The first unit of 87,529 square feet [4] received full credit. To the remainder of the 268,792, the declining gradations of selling-units were applied, that is 50% to the second 87,529 and 25% to the balance. Although, obviously, there was no balance, B-B was still allowed credit for it.

The baskets allocable per space-unit on the market were 419, and on the Association's reckoning, B-B received 724 baskets. If its warehouse had been allowed 100% on each space-unit, as B-B now asks, it would have received, it

[4] The then stipulated space-unit was 87,529 square feet. 333 F. 2d at 206. As noted herein, the figure has been rounded off to 87,500.

avers, about 851 baskets—its reduction, thus, was 127 baskets or 15% below the norm of the established warehouses.[5] This decrease we found on the first appeal had not been proved to be an unfair restraint. Danville Tobacco Assoc. v. Bryant-Buckner Associates, Inc., supra, 333 F2d. 202, 206, 208. The reasons for this holding are more fully expounded later herein, and on those grounds we adhere to our prior conclusion.

All assignments made in 1962, including B-B's and after distribution of the remaining time among the other warehouses, have since been continued in force pending a final adjudication upon the permanent plan. Thus it incorporates the 1962 allocations as a starting point. Actually, then, B-B has not so far been injured by the reductions stipulated in the permanent plan. On the other hand, it has been made eligible for the 8% gain-or-loss limitation of the permanent plan, not an original attribute of the interim plan.

B-B's apprehension as to the permanent plan appears to be premature and presently academic. However, as a member, B-B may have a right to contest the District Court's declaratory judgment upholding the permanent plan as a regulation of the Association enforceable upon future applicants. For this reason and to avoid any chance of incompleteness in our adjudication, as well as for comparison of the prevailing plan with the F.T.C.'s suggested plan, we undertake a discussion of the permanent plan.

Prior to and during World War Second, there was no surplus of storage space, and selling opportunities were shared by the warehouses by agreement or by employment of the floor-space method. After the war as building materials became accessible, the possibility of wasteful erection of additional warehouses created a problem in distributing selling time. The floor-space system was then

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[5] For the computation see 333 F. 2d at 208.

in vogue at Danville and continued undisturbed until B-B in 1962 sought to enter the market with an extensive warehouse.

Restrictions on the selling time of newcomers in a tobacco market of the kind applied to B-B in 1962 and provided in the permanent plan are not necessarily unlawful abatements. The evidence demonstrates that the confinement of a latecomer to less-than-average selling-units is necessary in order to maintain the integrity of the market, an institution quite generally recognized as an essential in the production and sale of tobacco. Asheville Tobacco Board of Trade, Inc. v. F.T.C., 263 F2d 502, 505 (4 Cir. 1959) reheard 294 F2d 619 (4 Cir. 1961). It is for this reason that the courts have sustained the power of a board of trade, such as the Association here, to regulate the disposal of selling time. Indeed, the vendition is held affected with a public interest and the Association is in some aspects almost a State agency. Cf. Asheville Tobacco Board of Trade, Inc. v. F.T.C., supra, 263 F2d 502, 507, 509.

Incidentally, because the quantity of tobacco salable each day has a fixed and constant maximum, its disposition presents an economic situation unfamiliar to those dealing in commodities less limited in supply. For this reason, auction under regulations has been considered the fairest means of sale for the producers, the buyers (the companies who furnish the teams of bidders) and the public. Cf. Rogers v. Douglas Tobacco Board of Trade, 244 F2d 471, 476 (5 Cir. 1957).

Without some circumscription upon the appearance of new, and the enlargement of existing warehouses, competition could be destroyed, and the market monopolized, contrary to antitrust policy by the warehouseman who was able to outbuild the others. Furthermore, unrestrained multiplication or expansion could so water down the business as to render it unprofitable and the market useless to the public. Even threats to overbuild could become an

item of trade. Healthy discouragement of surplus building, it has been found, may be achieved to a degree by fairly withholding full participation in the market from a stranger until he proves he is not gambling.

Any such association, therefore, has to endeavor to find the delicate balance between building-control and unfair restraint of competition. To assist in preventing the latter abuse, a gain-or-loss provision is frequently included, as in the permanent plan, in the regulations. It permits a new competitor to increase its selling time from year to year. At the same time it safeguards a warehouseman against an unjust loss of standing as the result of crop failures and like infelicitous contingencies. Naturally, this factor has frequently been in litigation, on the charge of unduly impeding a new arrival's attaining an equality with his predecessors. Nevertheless it has been upheld when it is seen to be reasonable in the circumstances. See Rogers v. Douglas Tobacco Board of Trade, 266 F2d 636 (5 Cir. 1959); Ashville Tobacco Board of Trade, Inc. v. F.T.C., supra, 263 F2d 502, 510-11, and as reheard 294 F2d 619, 625.

Instantly, the 8% gain-or-loss rate, while not expressly approved for use in the permanent plan, is not disfavored by the Commission if the initial allocation is not unreasonable. The percentage has been found by the master and the District Court to permit a fair augmentation of selling time. Likewise, neither finds unreasonableness in the 25% reduction of credit-units given a new entrant. In this, of course, the judge impliedly approves the 15% reduction of B-B under the terms of its 1962 admission to the Association. These ascertainments we cannot say are faulty.

II. B-B's foremost protestation, evidently, is the District Judge's refusal to replace the Danville system with the Commission's. The latter would give B-B, whether or not a new entrant, 975.85 baskets—an increase of 251 above its quota of 724—while decreasing by 251 the share of the oldest warehouse at Danville. We see no error in the Court's action.

To start with, the Commission's plan does not discourage superfluous buildings. Rather it invites new structures of first-unit size, because floorage of that quantity would receive an undiminished allotment equivalent to the first stage of each of the existing warehouses. Again, there is no absolute legal right in a new entrant to have a prevailing system remolded or discarded for a new model. The duty of a board of trade is to avoid or alleviate unfair restraint sufferable by a new or added warehouse. If this concern is relieved, then there is no just grievance. Presently, this aim has been achieved without a wholesale reshuffling or new dealing of the selling time.

The plan advanced by the Commission seems logical and acceptable enough for a market just opening, but caution should be used in uprooting an established and working system and recasting it in another form, especially one which goes beyond the limits of this controversy. Attempt at a wrenching reformation was thought by the District Court to be particularly and unwarrantably disruptive at Danville. During the years, the warehouses there have made adjustments in the distribution of selling time to absorb any floorage demand as it arose. They did so, to repeat, as late as 1962 to accommodate the entry of B-B. To inaugurate another system would mean the dissolution of reconcilements which have been found necessary and practicable from year to year. Sweeping innovations, unless indispensable, could force the parties to revive old irritations. Doubtlessly, too, myriad unforeseeable contentions could develop. A general rearrangement could also penalize warehousemen who had not contributed to overbuilding. These conclusions of the District Judge cannot be cast aside lightly, for there is wisdom in them.

In this consideration, it must be remembered that the Danville warehouse situation of today is the eventuation of an historical progression. It was not conceived deliberately or at one time; nor was it structured to exclude newcomers. It "just grew" into its present shape and state. The con-

ception of a new start puts theory above actuality. With the District Judge, we think it too speculative in success to be posted as the antitrust standard the Association must meet. Nor is it the province of a Federal court to divine and adjudicate hypotheses.

III. Unreasonable restraint of trade is also charged by B-B because, in assigning selling time figured on floorage, the computer counted space in the older warehouses which was not used for the sale of tobacco. The factual premise is indisputably true. The area required per basket is variously estimated from 20 to 40 sq. ft. Even at 50 sq. ft., only about 440,000 would be needed for the entire 8800-basket quota. In contrast, there are now more than 1,700,000 sq. ft.

Although this enormous excess is not utilized in the vendue of tobacco, it is needed to some extent for storage pending sale or resale. Concededly, some of the area is let out for purposes foreign to tobacco sales. Nevertheless, as the regulations of the Association already quoted will confirm, no floorage credit is given to any part of a warehouse which is not in truth readied or readiable for the sale of tobacco during the season.

B-B can hardly be heard to complain on the score of superfluous space, for it stands in pari delicto in the vice. Its allotment, apparently less than 800 baskets, could well be taken care of within 40,000 sq. ft., yet it has a warehouse of more than 168,000 sq. ft. and, to repeat, was granted selling time on a floorage of more than 268,000.

The Commission decried the superfluity of space generally, and recommended that it be remedied by Association regulations. In outlining its plan, the Commission used all the space now on the market. Although this is not to be taken as its approval, it does show that the Commission recognized that the problem must be resolved practically and within the facts of the Danville market. The Commission said:

> "It is our opinion therefore that, as a general proposition, any proper standard for the control of surplus space, i.e., selling time, on these markets should envision equality of treatment among all members of the market, present and future under whatever system each respective board of trade elects to adopt. Each such system moreover should countenance only the use of space which is in fact 'suitable and available'. This can best be dealt with by way of appropriate definition in the bylaws or other appropriate media."

This view prevailed, too, in the District Court. The present regulations do agree with the Commission's standard of a "suitable and available" warehouse. The permanent plan was accepted by the District Judge, we assume, upon the condition that the appropriation of warehouse space will be rigidly supervised and enforced by the Association.

In the circumstances we cannot declare the District Court in error for not sustaining B-B's indictment of the space excess as an antitrust evil.

IV. Lastly, B-B alleges it was denied an opportunity to show the Board its gain in the selling season of 1964, so as to obtain a larger allotment for 1965. The record does not sustain this grievance; on the contrary it indicates that ample opportunity was afforded B-B for the purpose. The failure to procure the allowance was due to no fault of the Association or the District Court.

The declarations and adjudications of the decree now on review will not be modified. In conclusion we observe, nevertheless, that the permanent plan is certainly not the ideal, nor do we hold it up as a criterion of reasonableness in all circumstances. We do not have the competence, as we pointed out on the first appeal, to construct plans. Our duty, as here, is simply to examine an existing plan and ascertain whether the legal infirmities imputed to it in truth exist.

Affirmed.

APPENDIX C

JUDGMENTS BELOW

(1) Judgment on First Appeal (No. 9136)

[Caption Omitted]

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the orders of the said District Court appealed from, in this cause, be, and the same are hereby, affirmed in regard to the 1962-1963 selling season; that the order in reference to the selling season of 1964 and subsequently is suspended; that this cause be, and the same is hereby, remanded to the United States District Court for the Western District of Virginia, at Danville, for proceedings consistent with the opinion of the Court filed herein; and that the costs on appeal be borne by the appellants.

/s/ SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.

/s/ CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

/s/ ALBERT V. BRYAN
United States Circuit Judge.

FILED
May 14 1964
MAURICE S. DEAN
Clerk

(2) Judgment on Second Appeal (No. 10579)

[Caption Omitted]

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

/s/ ALBERT V. BRYAN
United States Circuit Judge.

FILED
Jan 25 1967
MAURICE S. DEAN
Clerk

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
STATEMENT	2
REASONS FOR DENYING THE WRIT	7
1. Whether a Reasonable Diminution of Selling Time to a Newcomer Constitutes a Restraint of Trade in Violation of the Sherman Anti-Trust Act or is an Unfair Trade Practice.	7
2. Are the United States Courts Bound as to the Law and Facts by an Advisory Opinion Given by the Staff of the Federal Trade Commission Without Hearings and Which When Originally Given Was Erroneous on its Face?	10
3. Can a Litigant for the First Time in an Appellate Court Attack the Appointment of a Master Made Without Objection and Upon the Request of Acquiescence of All Parties in the Absence of Fraud or Misconduct?	13
CONCLUSION	16
APPENDIX	

TABLE OF CASES

Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F. 2d 502, 511 (4th Cir. 1959) 8, 9

Asheville Tobacco Board of Trade, Inc. v. FTC, 294 F. 2d 619, 629 (4th Cir. 1961) 8

Associated Press v. United States, 326 U.S. 1, 27, 65 S. Ct. 1416, 89 L. Ed. 2013 8

Federal Communications Commission v. R.C.A. Communications, Inc., 346 U.S. 86, 91, 92, 73 S. Ct. 998, 97 L. Ed. 1470 8

Rogers v. Douglas Tobacco Board of Trade, 244 F. 2d 471, 479 8

IN THE

Supreme Court of the United States

October Term, 1966

No. 1197

BRYANT-BUCKNER ASSOCIATES, INC.,
Petitioner,

v.

THE DANVILLE TOBACCO ASSOCIATION,
A CORPORATION;
PRODUCERS TOBACCO COMPANY, INC.;
DANVILLE WAREHOUSE COMPANY, INC.;
ET ALS.,
Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PRODUCERS TOBACCO COMPANY, INC. IN OPPOSITION

QUESTIONS PRESENTED

The question presented are:

1. Whether a reasonable diminution of selling time to a newcomer constitutes a restraint of trade in violation of the Sherman Anti-Trust Act or is an unfair trade practice.

2. Are the United States Courts bound as to the law and facts by an advisory opinion given by the staff of the Federal Trade Commission without hearings and which when originally given was erroneous on its face?

3. Can a litigant for the first time in an appellate court attack the appointment of a master made without objection and upon the request or acquiescence of all parties in the absence of fraud or misconduct?

STATEMENT

The Danville Tobacco Association filed a class action, a Petition for Declaratory Judgment, against all the Danville tobacco warehouse firms (10a)*, joining the tobacco speculators and tobacco buyers as class defendants, asking that the District Court determine the reasonableness of a plan, allotting selling time between the various warehouses upon the market. The Producers Tobacco Company, Inc., answered and also filed a Counterclaim and Cross-claim seeking affirmative relief (22a). This pleading contained a careful analysis of the entire problem and was ultimately admitted as evidence (343a). It alleged that the Danville Tobacco Association had allocated selling time by the Floor Space Method since 1948 which had resulted in building wars of unneeded warehouse floor space with no benefit to the farmer or the public. Producers asked that the Court approve a reasonable plan for the allocation of selling time among warehousemen based upon performance.

The District Court appointed a special master with counsel for all parties *agreeing thereto* (54a) and subse-

* Reference to the Joint Appendix filed in the first appeal will be by the page number followed by the letter "a"; reference to the Petitioner's Appendix will be by the number followed by the letter "b"; reference to the Appendix of this brief will be the number followed by the letter "p".

quently entered an Interlocutory Order on June 16, 1962 (382a, 383a), acknowledging the request for general relief relating to the allocation of selling time for 1962 and subsequent years (84a).

The Special Master filed his report on November 29, 1962 (110a) recognizing the chaotic situation existing on the Danville Tobacco Market due to excess of floor space in Danville and approving a Performance Plan. The newcomer under the plan would not be given full credit initially but could acquire full credit by performance in approximately two to three years. On March 6, 1963 the District Court approved this plan (171a) which has become known as the "Danville Plan."

The Danville Tobacco Association is the local Board of Trade in Danville, Virginia, its membership consisting of warehousemen, tobacco buyers and tobacco speculators. Due to various regulations, the market operates only twelve to fourteen weeks (211a) and sells during that period approximately 65,000,000 pounds of leaf tobacco (29a). The selling day is limited to 8800 baskets arrived at by multiplying 5½ (the hours a tobacco buyer works a day) x 400 (the baskets permitted to be sold per hour) x 4 (the number of buyers furnished by each major buying company) (114a).

From 1948 (32a) until 1962 the Danville Tobacco Association allocated selling time on the Floor Space Method, giving no consideration to a warehouse operator's past experience or performance. As a result, literally thousands of square feet of surplus and unneeded (201a) floor space (200a, 368a, 412a) was built on the part of some warehousemen to stay in business (286a, 449a), and on the part of others, to hog the market (36a, 61a, 286a). When one warehouseman would build a warehouse, many others would build simply to gain selling time or hold the

selling time they previously had (286a, 305a, 449a, 452a). In the spring of 1962, Bryant-Buckner joined the Danville Tobacco Association and applied for an allocation of selling time based on a proposed warehouse of 500,000 square feet (188a). Had this request been granted, the new entrant would have been granted about 2200 baskets or 25% of the market, its first year in business (202a) despite the fact that it had done nothing to build-up the market. The Danville Tobacco Association thereupon worked out a new plan for the allocation of selling time, limiting the time granted a new entrant, as well as time allowed an old operator for a new construction, and then filed its request with the District Court to determine the reasonableness of this plan.

Upon the taking of evidence W. N. Terry, Jr., President of the Danville Tobacco Association, and the owner of an individual tobacco warehouses, testified that the market was overbuilt eight times the amount of space needed to efficiently meet the market's needs and the proposed construction by Bryant-Buckner would create a chaotic condition (184a, 223a). This condition was further recognized by the testimony of Mr. Royster, stating that almost half of the tobacco warehouses in a five state area were vacant, having been built simply to gain or keep selling time (285a, 302a). It was clear that if Bryant-Buckner were to build a monstrous warehouse, others would have met the challenge by building equally large unneeded space (194a) which would have led to chaos, with no benefit to the farmer or to the public (196a, 286a, 449a, 450a). The problem is shown when it is borne in mind that the allocation of selling time actually represents the tobacco warehousemen's gross earning power (219a).

C. D. Bryant, Jr., President of Bryant-Buckner, testified that he applied in writing for selling time based on a

warehouse having 500,000 square feet (257a); later testifying that he was compelled by contract to construct 250,000 feet (260a); and still later jumping at the opportunity of constructing only 165,000 square feet (264a). Bryant-Buckner's counsel stated that Bryant-Buckner was compelled to build 265,000 square feet (394a) and that Bryant-Buckner was willing to accept 734 baskets for the year 1962 (366a). Mr. Bryant stated, "The exact size of the building will be 268,792 feet" (418a). This building was never constructed. The allocation of 734 baskets to Bryant-Buckner was made on the assumption that Bryant-Buckner would construct 265,000 square feet (409a).

J. I. Warren, a local tobaccoman testified he owned two large warehouses prior to the 1962 season (268a), and constructed 140,000 square feet, to meet the threat of Bryant-Buckner, to keep what he had (268a).

Fred S. Royster, an expert in the field testified that the Floor Space System was unreasonable and inefficient (292a), that it was the worst system (304a), and was not the best system for the farmer (312a). He recognized the chaotic condition of the Danville Market and referred to the market as being "on the brink" of disaster (305a, 312a, 313a). He recommended the Performance Plan (284a).

Professor Victor C. Heck, *an expert witness presented by Bryant-Buckner,* stated that Bryant-Buckner should be limited as a new entrant to the market to the "break-even point" which might be from 75% to 90% (317a). Other evidence showed this break-even point to be 5% of the selling time or 440 baskets (224a). Further evidence indicated the break-even point to be around 7% or 616 baskets (67a). (Bryant-Buckner actually received 724 baskets under the plan adopted by the District Court). This witness also endorsed the Performance Plan (318a).

Jack W. Garrett, manager and part owner of Producers, testified under adverse examination by counsel for Bryant-Buckner. Mr. Garrett stated that Producers had to build a new warehouse in 1952 to survive and stay in business (449a), having been driven off the Fairmont, North Carolina, market by the uncontrolled building brought on by the Floor Space System. This was after having been in business on that market for twenty-three years (450a). The other small warehouses, Virginia-Carolina, also had to build simply to survive (452a). Mr. Garrett testified that Producers had always fought the Floor Space System (454a). A large part of Mr. Garrett's testimony was incorporated in Producers pleadings (22a), and the suggested plan for 1962 and the Memorandum in support thereof (60a) were duly admitted in evidence (343a).

It was upon this status of the record that the order of March 6, 1963 was entered, an appeal taken and the decision of the Circuit Court rendered.

Subsequently, the Federal Trade Commission filed a report which contained obvious errors and was difficult to understand (9p, 10p). The District requested a supplemental report, which was filed in due course. All parties were given the opportunity to file exceptions to the report. The District Court then heard the several matters on September 23, 1965, November 1, 1965 and January 21, 1966. The matter was taken under advisement and the Court's decision rendered February 9, 1966.

The petitioner while opposing the Plan on the one hand, applied for an increase in selling time for the 1965 season based on its performance in 1964. Although the application was filed months later than the Association's rules required (1p), the petitioner insisted that it be granted an increase. The District Court, to accommodate the petitioner, suggested that the Association audit the books of

the petitioner to determine if it were entitled to an increase.

The Sales Committee of the Association spent several days attempting to audit the petitioner's books, only to discover that the most necessary records, the basket tickets, were missing. The petitioner had no explanation for the missing records and refused to produce them (1p). It is well known in the industry that these tickets are essential to a valid audit for they are the only receipts endorsed by all parties including the government grader. On the basis of the missing records, the Association refused to grant petitioner an increase for 1965.

Producers filed a petition on June 11, 1965 requesting the District Court to approve the same selling schedule for 1965 that was used in 1962, 1963 and 1964 (11p).

The Special Master filed his second report on December 1, 1965, recommending as the permanent Plan, the Plan which had been used since 1962. The District Court heard the matter *ore tenus* on January 21, 1966, and at the conclusion took the matter under advisement. Its order approving the permanent Plan was entered on February 9, 1966. From this order an appeal was taken by the petitioner and on January 25, 1967, the United States Court of Appeals For the Fourth Circuit affirmed the District Court's action.

REASONS FOR DENYING THE WRIT

General Law On The Question Involved

1. WHETHER A REASONABLE DIMINUTION OF SELLING TIME TO A NEWCOMER CONSTITUTES A RESTRAINT OF TRADE IN VIOLATION OF THE SHERMAN ANTI-TRUST ACT OR IS AN UNFAIR TRADE PRACTICE.

The point raised as to a reasonable diminution of selling time to a newcomer has been repeatedly decided and is not

novel. Certainly, the theme of the decisions of the Court in *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F. 2d 502, 511 (4th Cir. 1959) and *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 294 F. 2d 619, 629 (4 Cir. 1961), is that a plan which provides a reasonable vehicle for the new entrant to compete is acceptable although there is some diminution to a newcomer. These decisions were based upon the decisions of this Court, and as will be shown later, with particular reliance upon the decision of this Court in *Federal Communications Commission* v. *R.C.A. Communications, Inc.*, 346 U.S. 86, 91, 92, 73 S. Ct. 998, 97 L. Ed. 1470, and the concurring opinion of Justice Frankfurter in *Associated Press* v. *United States*, 326 U.S. 1, 27, 65 S. Ct. 1416, 89, L. Ed. 2013. Further, the United States Court of Appeals for the Fifth Circuit applied the same principles in *Rogers* v. *Douglas Tobacco Board of Trade*, 244, F. 2d 471, 479.

The hope of the petitioner is based upon the opinion of the Federal Trade Commission, referred to as the FTC, which was filed in this matter. Basically, it may be said that the crux of the disagreement of the FTC with the plan adopted, which has become known as the "Danville Plan," is that the FTC wanted to give to the new entrant 100% for the first unit of space. If this view were accepted, it would mean that merely by building a warehouse of approximately 87,500 square feet a new entrant could enter the market on a 100% parity with existing warehousemen. This position completely overlooks the very nature of a "tobacco market" and is inconsistent with the petitioner's own expert witness who testified the new entrant should only be given enough of the market to "break-even" (317a).

A "tobacco market" is defined by Professor Clyde C. Carter in his research paper upon "State Regulation of the

Marketing of Leaf Tobacco" (1961), (Exhibit 13) at page 4, as "* * * every community with one or more warehouses where leaf tobacco is sold at auction." Thus, a "tobacco market" is something tangible created by the investment of persons in facilities to create such market and the good will instilled in the farmers and buyers by advertisement and service. The Special Master's report pointed out that tobacco associations and individual tobacco warehousemen are instrumental in advertising and creating the atmosphere which is inducive to the farmer to bring his tobacco to that market for sale and to the buyers to buy at that market. The competition between tobacco markets has always been severe. A farmer in the Danville area may very well go to the South Boston, South Hill, Lawrenceville or various markets in North Carolina if he finds them more attractive. Thus, the creation of the market as well as the maintenance of the market are both important items.

The Circuit Court of Appeals in its decision in *Asheville Tobacco Board of Trade, Inc.* v. *FTC, supra,* stated (at page 511 of the Federal Reporter):

> "The Commission does not disapprove of the adoption of a performance system, as opposed to a floor space system or other method of allocating selling time. When a performance system is used, it is necessary to adopt some sort of new warehouse provision and arguments suggest themselves for and against any type of new warehouse provision which might be adopted. On the one hand, the prevention of overbuilding and building warehouses is a legitimate objective; on the other hand, the owners of existing warehouses should not be allowed to prevent the construction of desirable new facilities. The controlling principles, as stated by the Supreme Court in *Federal Communications Commission* v. *R.C.A. Communica-*

tions, Inc., 346 U.S. 86, 91, 92, 73 S. Ct. 998, 97 L. Ed. 1470, and in the concurring opinion of Mr. Justice Frankfurter in *Associated Press* v. *United States*, 326 U.S. 1, 27, 65 S. Ct. 1416, 89 L. Ed. 2013, were quoted and applied by the Fifth Circuit in *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d at page 479. Competition is not an absolute. Every restraint of trade is not a violation of the antitrust laws; the decisive question is whether it is an unreasonable restraint, and this depends on the significance of the restraint in relation to the particular market under investigation."

The adjustment between the old warehousemen and the new entrant involves the acquiring of baskets by the new entrant and the taking from the old operator a part of what he had. Thus, the new entrant receives a transfer from the old operators of a part of the creation and good will of the market existing before his application; thus, in all fairness there must be some reasonable diminution but such as would not deter the full opportunity to compete and pass the old operators within a reasonable time. This is what the Danville Plan accomplishes for within three years the new entrant may surpass the old operator upon performance.

2. ARE THE UNITED STATES COURTS BOUND AS TO THE LAW AND FACTS BY AN ADVISORY OPINION GIVEN BY THE STAFF OF THE FEDERAL TRADE COMISSION WITHOUT HEARINGS AND WHICH WHEN ORIGINALLY GIVEN WAS ERRONEOUS ON ITS FACE?

The decision previously quoted referred to the market "under investigation." This term is of interest because the position of the petitioner is apparently that the United

States Courts do not have the power to decide but must accept the report of the Federal Trade Commission as a matter of law upon the issues presented. Certainly, the statutes cited give no clue to a surrender of the said Courts' jurisdiction to hear and decide violations of the Anti-Trust laws.

A review of the situation apparent to the District Court is important. The record will disclose no evidence taken by the FTC to support its findings or conclusions as to the Danville Market. It is not our purpose to make a general attack upon the Commission but we do feel compelled to point out the inadequacy of the investigation and to observe that the report apparently was written with burley markets in mind, such as the Asheville Market, where additional space may be desirable. So far as we know, only the petitioner was interviewed in Washington. We have heard that one person in Danville received a telephone call from a representative of the FTC but this respondent never so much as received any notice of any hearing (nor had any opportunity to present its views) despite the fact that it had vigorously opposed the Danville Tobacco Association in the District Court and Appeals Court in the first appeal and was instrumental in creating the Danville Plan which was ultimately adopted. There was no investigation so far as we can ascertain. Nor did the petitioner make any effort to schedule a hearing before the District Court to present evidence which would substantiate the repeated claims made by it. Yet it supports a report which makes no distinction between the Boone Market, a burley market where the commodity is not perishable, and the Danville and Fuquay-Varina Markets which are perishable markets with entirely different space requirements.

Despite this lack of any investigation, the Commission recommended a plan which would give a new entrant 100%

credit for his unit of space if he elected to build a warehouse of 87,500 square feet. It did not recommend 80, 85, 90 or 95% credit but a full 100%. Nor did it recognize that when the new entrant receives his allotment, it must be deducted from the old warehouseman's allotment and thus reducing the old warehouseman's allotment for his first unit. This recommendation is made when the new entrant had neither created, built, nor maintained the market of which he claims a part by merely building a warehouse, wholly owned by him, and with which he seeks to compete with those who did create, build and maintain such market. We do not wish to create the impression we begrudge competition, for Producers has steadfastly fought for a performance plan. However, the new entrant should not be given the competitive advantage of a whole slice of the pie with no diminution to offset the investments in advertisements and creation of good will for the market when others have already expended their funds and efforts to create such market.

We do say that the test must be the "reasonable test." The diminution must be reasonable and if it is claimed that the plan is not reasonable, evidence must be secured by qualified persons to show why it is not. The new entrant must be given an opportunity to compete fairly, but we support the position that 75% is reasonable. Very few businesses are opened in which the new entrant is guaranteed that he will have a ratio of 75% of the customers of his competitors the first year upon the mere construction of his facility. Indeed very few new businesses can expect that they can through performance be on a par within three years (8% increase per year by performance) with their finest competitor. The absurdity of the petitioner's statements as to competitive positions of old and new warehouses is seen when it compares the 724 baskets allotted

the petitioner, its first year in the market, and the 785 baskets allotted this respondent after fifty years in the market.

The results of the adoption of the Plan as formulated by the FTC would be disastrous to the farmer as well as the market. Immediately, a number of one unit size warehouses would be built with demands for a 100% credit for each. The entire market would be thrown into financial chaos with the stability of the service to the farmer being sacrificed by speculators who will construct one unit warehouses and immediately reap a harvest of 100% of the market per unit. The farmer must sell his product and accordingly, he can either go to a competing market or deal with such speculators who are forced upon him.

The Circuit Court of Appeals in its first opinion in this matter noted that experts for both sides recognize the rightfulness of a diminution to a newcomer. This fact being established by experts for both sides and having the past approval of the Courts, no reason for adopting the unsupported position of the FTC has been shown.

It may shock this Court to know that the adoption of the FTC Plan would result in an immediate increase in the number of baskets allotted to this respondent. However, the ultimate result upon the market would be so disastrous to the general welfare of the market that this respondent cannot in good conscience support such a plan.

3. Can a Litigant for the First Time in an Appellate Court Attack the Appointment of a Master Made Without Objection and Upon the Request or Acquiescence of All Parties in the Absence of Fraud or Misconduct?

Reference to the record will disclose that the order of the District Court of May 12, 1962 (54a) recites that all

parties agreed to the appointment of the Master. Further it is conceded by the petitioner that no objection was made. There is no charge of fraud or misconduct. In regard to the Master's reports no error is pointed out and actually the entire record, including the petitioner's witness, supports his position. Indeed, in those cases where the appointment is questioned some basis for attack has been shown.

Probably this position of the petitioner is best answered by Justice Bryan in his first opinion where he stated (A14b):

> "The aspersions deliberately directed at the master in the briefs of Bryant-Buckner's counsel, attempting to impugn his motives, and the disparaging references to the trial judge, are entirely unfounded. We deplore such tactics and condemn them."

The petitioner has failed to set forth a case which should be reviewed because:

1. The plan adopted has proven to be a fair vehicle for the entrance into the market of newcomers. Further, *it provides for competition* with a potential of an 8% annual growth based upon performance. There has been shown no exclusion from the market or any substantial part of the market. Indeed, the petitioner is on a practical par with this respondent on the market and with full opportunity to increase annually on the same basis as all other warehousemen. Counsel realizes that there has not been an extensive discussion of authorities, but no conflict between the Circuit Courts of Appeal has been shown; nor have any cases in point which conflict with the decision of the Court of Appeals for the Fourth Circuit in this matter been cited by petitioner.

2. The only conflict between the FTC plan and the one adopted was the long established doctrine of reasonable diminution and what is reasonable becomes a question of fact. It is also clear that the FTC report was not based upon evidence or as a result of hearings and conflicted with the opinion of the expert presented by the petitioner upon the taking of the evidence.

3. The claim of Bryant-Buckner that it is in a less favorable position than under a floor space plan is attributable to its failure to show that it has performed so as to be entitled to an increase. The petitioner failed to produce the records required to show that its performance warranted an increase (1p).

4. The claim that the case should be reviewed because a special master was appointed who was experienced in the field and had many contacts in the field, falls of its own weight when it is realized that he did not decide the issues but the issues were decided by the District Court after hearing experts for both sides.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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PROCEEDINGS OF SEPTEMBER 23, 1965

[TR. P. 12]

MR. MEADE: If it please the Court, the situation is this: As we have already stated, as far as 1964 is concerned, that is over with, that is, the allocation of 1964. Everybody agreed to it. Everybody operated under it. Everybody was happy with it. In March, the second Tuesday in March, 1965, a Sales Committee meeting was held after due notice. Bryant-Buckner was represented at that meeting. No application was made for any additional selling time. That is the time at which any warehouseman who wants an increase in allocation of selling time makes it known and requests it. [TR. P. 13]

Now at that meeting on the second Tuesday in March, 1965, no such request was made by Bryant-Buckner. The meeting was held and the minutes show for themselves the action taken by the Sales Committee.

PROCEEDINGS OF NOVEMBER 1, 1965

[TR. P. 17]

MR. GARRETT: Your Honor please, I would like to get one thing in right here.

Mr. Biggs was not present at the other meeting, and I don't know how he is communicating with his client, but the committee found that the Bryant-Buckner basket tickets had been destroyed, so that his record—it was absolutely impossible for anyone to go in there and determine. Why they destroyed them, we don't know, but the committee found that they were destroyed.

Now if he doesn't know this fact, I think he should communicate with his client, and I wonder if the position is well taken this morning.

MR. BIGGS: I didn't want to get into that, Your Honor,* * *

[TR. PP. 80-82]

Q In other words, what you are saying, Mr. Lea, is that if the FTC Report as regards the allocation of selling time is adopted, then it would be your view that the old members of the market here should modify their existing rules about withdrawals, leases, transfers and mergers. Is that correct?

A No, sir.

Q And you say that if these provisions are adequately enforced so that only bona fide new entrants could come onto the market it would give you adequate protection?

A I would think—This is just my own idea, but I would think certainly that you could dissolve a partnership, and if you were completely disassociated with one another, I think it would be two firms.

Q In other words, if this is not the case, then you misunderstand the rules as they are presntly written. Is that correct?

MR. MEADE: Your Honor please, I object to the question.

MR. WHEATLEY: Object to the form of the question.

MR. MEADE: It is a legal question and it is argument, and I think it is improper.

MR. BIGGS: The thing that my examination is directed to, Your Honor, is that the rules are written in the record, and his evidence that this will tragically affect his partnership may very well be based on a misunderstanding of those rules.

MR. GARRETT: Your Honor please, the rule that he is quoting is directly from the "Royster Plan" rather than from the regulation of the Danville Tobacco Association, and he is, I believe, trying to mislead this witness.

MR. BIGGS: No, it is my understanding that these rules were adopted—

MR. GARRETT: Aren't these rules that you are quoting from the "Royster Plan" which you seem to be attacking?

MR. BIGGS: These rules are part of the regulations of this market, Mr. Garrett.

MR. GARRETT: Which are a part of the "Royster Plan," aren't they, Mr. Biggs?

MR. BIGGS: Yes, they are. There is no question about that.

MR. GARRETT: All right, sir.

MR. BIGGS: They are part of the present regulations of this market.

MR. GARRETT: I think that contradicts your position.

MR. BIGGS: I don't think it does in any way, sir.

THE COURT: All right, anything further?

EXCEPTIONS

Producers Tobacco Company, Incorporated, by counsel, objects and excepts to the advisory report of the Federal Trade Commission as filed in the Clerk's Office of the United States District Court at Danville, Virginia, on May 14, 1965, for the following reasons:

1. The advisory report of the Federal Trade Commission failed to follow the directives of the Fourth Circuit Court of Appeals in its opinion rendered on May 14, 1964, by which the Fourth Circuit Court of Appeals remanded this case with directives to the District Court to refer the permanent plan to the Federal Trade Commission, request-

ing it to investigate and advise the District Court upon the validity of the proposed plan or to prescribe an appropriate plan, in that it arbitrarily, and without authority to do so, consolidated this case with the other cases in North Carolina mentioned in its report, along with other cases pending before the Federal Trade Commission, and not involved in litigation, when the facts involved in the other litigations and the other cases initiated before the Federal Trade Commission were entirely different, and not applicable to the Danville situation. The report in handling the problems of two flue-cured and one burley market in a single advisory report ignored the vast differences between flue-cured and burley tobacco markets. The record in this case shows that tobacco offered for sale on a flue-cured market is highly perishable and must be sold promptly, whereas burley tobacco will remain in a non-perishable status indefinitely. The difference, of course, is the fact that tobacco in the Danville market area is flue-cured, or cured by heat, whereas burley tobacco is air-cured. The record further showed that flue-cured farmers prefer to sell their tobacco not later than one day after delivery to the tobacco warehouse, whereas burley farmers prefer to deliver their tobacco to the tobacco warehouse and to fill all available floor space as soon as the warehousemen will receive it. It is, therefore, obvious that the wishes and best interests of the burley farmers require far more floor space on a burley market than the wishes and best interests of farmers on a comparable basis on a flue-cured market. The report of the Federal Trade Commission constitutes better advice for an appropriate plan on a burley market rather than on the Danville flue-cured market.

Further, consideration should have been given by the Federal Trade Commission to the evidence in this case that

the selling season on the Danville tobacco market has consistently grown smaller from year to year. For example, the selling season formerly was September 1st to the following March 1st but has consistently been curtailed so that during the regular sales season of 1964, there were only 49 days of selling time. The record will show that of these 49 days of selling time during the 1964 sales season on the Danville tobacco market, there were 33 days with 8800 baskets for sale, 4 days with from 7920 to 8900 baskets for sale, 1 day with 7747 baskets for sale, and only 11 days with less. The Danville tobacco market was blocked 67.35% of the time and the market was 85% full for 75.5% of the time. These figures clearly illustrate the vast differences between selling tobacco in the Danville area and selling tobacco in a burley area.

2. The report of the Federal Trade Commission, in advising the District Court that a new entrant to any market, including the Danville market, be allowed the same allocation of selling time as that given to old warehousemen for each unit of their warehouses as already established on the market, without any restriction or limitation on the new entrant, failed to follow the directive of the Fourth Circuit Court of Appeals in its said opinion in which it sanctioned a less-than-average-time allowance to a fresh entrant, and in doing so it is now advising the District Court to overrule the Fourth Circuit Court of Appeals, when the Fourth Circuit Court of Appeals stated in its said opinion that the present suit's very object was to tailor floor space to a reasonable pattern coming within the anti-trust statutes.

3. The report of the Federal Trade Commission, which was directed by the Fourth Circuit Court of Appeals to investigate the permanent plan in question, and to advise

the Court upon the validity of the proposed plan, or to prescribe an appropriate plan, failed to do either, simply being an arbitrary and bureacratic treatise foreign to the directives of the Fourth Circuit Court of Appeals, it being apparent from the report that the Federal Trade Commission was attempting to act in a judicial capacity, rather than in an administrative or investigative capacity, as indicated. The Federal Trade Commission before handing down its report held no hearings, took no new evidence, and gave the participants in this litigation no opportunity of explaining the differences between a flue-cured and a burley market, or to show or present evidence proving their contentions, factually or otherwise. The report failed to consider, much less give any credit to the old warehousemen for their expenditure of vast sums of money and effort over many years for the establishment of goodwill and the other factors creating and resulting in a going and successful to-build an already overbuilt tobacco market, the apparent bacco market.

4. The report of the Federal Trade Commission under its conclusions and recommendations on page 16 thereof, condemns the old warehousemen for the admitted overbuilding of the Danville market and thereafter adds insult to injury by advising the District Court to go back to the condemned floor space method and open the market wide open for any and all new entrants to come in and over-effort by the Federal Trade Commission having been to establish a system giving no credit to the old warehousemen for the establishment of a going and successful tobacco market, but giving full opportunity for any and all new entrants coming into the market in an apparent attempt to emphasize competition on an unlimited basis on the floor space plan which, as stated, has already been con-

demned and denounced as unfair and unsuitable to this or any other market.

The suggested plan, if any, of the Federal Trade Commission would cause the following:

An operator whose holdings were 0 three years ago, would get 135% of his present selling time, whereas one who has expended over 400% in the past 15 years would get 102%. One who has been on the market for over 75 years, and who has lost ¾ths of its selling time by not expanding at all, would get only 84%.

The report of the Federal Trade Commission alleges that its suggested plan, if a plan, would treat all operators, both old and new, alike, but this is what it would actually do:

If a new operator should build a house of 87,500 square feet, he would get 542 piles per day, whereas for the same house the smallest present operator would get only 317 piles, and the largest operator would get 136 piles.

Obviously, this so-called plan of the Federal Trade Commission would leave all old and established operators with only one way to go, that is down, with a consistent and constant loss of selling time from year to year.

Since the proposal of the Federal Trade Commission would allow any new entrant much more selling time according to floor space than any present operator now has, it would actually encourage and invite the disaster this present suit was designed to prevent, that is ruinous overexpansion of the Danville tobacco market. It is self-evident that the so-called proposed plan of the Federal Trade Commission would be even worse than the straight, or old floor space plan which has long since proved itself ineffective, and which the United States Fourth Circuit Court of Appeals has described as being "menacing."

5. The report of the Federal Trade Commission failed to recognize the need for a performance plan, or experience system, as already approved by the Fourth Circuit Court of Appeals, and constitutes an ill-advised suggestion to the District Court to adopt a mere space plan designed solely to facilitate and insure ease of entry into the market by any and all new entrants. This, in effect, ignores the holding of the Fourth Circuit Court of Appeals that dividends of selling time in a tobacco market can not be set apart with precision, and the admission by the Fourth Circuit Court of Appeals that a just tolerance is permissible and that it is right for there to be a diminution of selling time to a new entrant.

6. The report of the Federal Trade Commission states judicially that no present operator has a vested interest or other property right in the allocation of selling time, which is denied, since an old warehouseman does have some interest and does have some property rights which should be considered and which were considered reasonable by the Fourth Circuit Court of Appeals. The report fails to take into consideration the right of an old and established warehouseman to get due and fair consideration for participation over many, many years in the establishment of a going and successful tobacco market.

7. The report of the Federal Trade Commission in essence rejects the proposed Danville plan which the Fourth Circuit Court of Appeals has already held to be innocent of anti-trust guilt, the Court finding no unjust combination, conspiracy or monopoly, and the Court further finding that the plan represented an effort on the part of the Board of Trade to put in force an equitable adjustment among all of the warehousemen, both old warehousemen and new entrants, all of the constants of supply, selling time and buyers, all of which had been lawfully fixed.

8. The report of the Federal Trade Commission which calls for credit for the first full unit to established operators, as well as to new entrants, fails to give due consideration or credit to the old warehousemen for the establishment of a going and successful tobacco market, which is contrary to the holding of the Fourth Circuit Court of Appeals in this and other cases.

9. The report of the Federal Trade Commission is simply a suggestion to the District Court for the re-establishment of the old and impossible floor space plan, which is unrealistic, as well as impossible in performance, and failed to show the invalidity of the Danville plan or to prescribe any other appropriate plan other than, as stated, a going back to the old floor space plan, which would inevitably result in further and greater overbuilding of the existing market. In essence, the suggested plan of the Federal Trade Commission would have the District Court to order a return to a system which the Fourth Circuit Court of Appeals has held to have serious defects but none more menacing than the increase of floor space not to meet a need but to enlarge a warehouse's proportion of selling time, which would be contrary to the best interests of the farmers of this area.

10. The report of the Federal Trade Commission was not factually correct. In addition to ignoring the part that Producers Tobacco Company, Incorporated, and all the old operators played in building up the existing Danville tobacco market, the report stated that in 1950 there were 6 firms having 12 warehouses, whereas there were 7 firms having 18 warehouses, and referred to a total space of 908,323 square feet, whereas there were 954,134 square feet. The report on line 4, second paragraph, page 5, referred to B-B, a new entrant, as having applied for 400,000 square feet of space, whereas the opinion of the Fourth

Circuit Court of Appeals showed that it had applied for 500,000 square feet. The last sentence on page 5 of the report stated that Motley had been granted full time on the basis of the then existing floor space system, whereas Motley was cut by 10%. On page 17, lines 10 and 11, the report stated that old members kept all credit for all old space, which was erroneous, the old warehousemen losing selling time every time a new entrant came into the market.

11. The whole report of the Federal Trade Commission shows an apparent leaning to and prejudice for the new entrant; B-B, as well as for any and all future entrants at the expense of the old and established warehousemen in the Danville market. If the Federal Trade Commission were in fact a marriage counseling agency, it would seem that it would concern itself only with the problems of the brides, failing to realize that a new entrant changes its category after the marriage has been consummated, and thereafter the new entrant automatically becomes an old warehouseman.

12. The report of the Federal Trade Commission is designed, whether purposely or not, to destroy the public auction system of selling tobacco. The proposed plan of the Federal Trade Commission would inevitably result in such chaotic conditions for the private enterprise of selling tobacco at public auction that the system would be taken over by the government in the form of a governmental monopoly, such as that in existence in Great Britain, in Japan, and in other countries. If this is the ultimate purpose of the proposed plan of the Federal Trade Commission, then Producers Tobacco Company, Incorporated, will be the first to concede that such would follow from the adoption by this Court.

13. In the opinion of the Fourth Circuit Court of Appeals, it was stated that Producer's was appealing on the ground that the Danville plan would not provide adequate protection against improper tactics of members, and would not give a member credit for past performances, thereafter holding that the general fairness of the plan was not an analysis appropriate for the Court. The proposed plan of the Federal Trade Commission does not make any suggestion, fair or otherwise, as to these matters, the report obviously ignoring another of the directives of the Fourth Circuit Court of Appeals. These matters relate to the contentions of Producers Tobacco Company, Incorporated, that V-C and Producers, the smallest firms, should have been allocated more selling time under the Danville plan as originally adopted. By the fair inferences from the opinion of the Fourth Circuit Court of Appeals, it was desired that the Fedral Trade Commission should concern itself with these problems and to investigate and advise the District Court accordingly. This the Federal Trade Commission did not undertake to do. It is apparently clear that the Federal Trade Commission was not interested in any manner in the problems and welfare of the small, but old and established warehousemen, whereas in truth it is evident that its interest was entirely for any and all new entrants, having no concern for any old and established warehousemen, whether small or large.

PETITION

Producers Tobacco Company, Incorporated, by counsel, hereby petitions the Court to approve and order into effect for the 1965 sales season the same selling schedule as that approved and ordered for the 1962-1963-1964 selling seasons, the same to be temporary, so as to permit the orderly operation of the Danville tobacco market for the 1965 sell-

ing season, and in order to give this Court and all parties concerned reasonable time in which to consider said report of said Federal Trade Commission, to more fully object and except from the proposals therein contained, and so as to give this Court reasonable time in which to formulate and approve a permanent plan for the Danville tobacco market in keeping with the decision of the United States Fourth Circuit Court of Appeals as decided on May 14, 1964, the said Producers Tobacco Company, Incorporated, praying for the entry of an order protecting it and all other parties concerned from any taint of unreasonable restraint pending the approval and adoption of said permanent plan, and the said Producers Tobacco Company, Incorporated, further praying that the report of the said Federal Trade Commission be rejected *in toto* in so far as it deviated from the plain and explicit directives of said opinion of said Fourth Circuit Court of Appeals.

PRODUCERS TOBACCO COMPANY,
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SUPREME COURT, U.S.

FILED

APR 27 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 1197

BRYANT-BUCKNER ASSOCIATES, INC.,
Appellant,

v.

THE DANVILLE TOBACCO ASSOCIATION,
A CORPORATION, ET ALS.,
Appellees.

REPLY AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Introductory Statement	1
Questions Presented in Petition	5
Appellant Has Not Come Into Court With Clean Hands	8
Reasons for Refusing Writ	12
F.T.C. Reports	12
Addendum	19

CASE CITED

United States, et al v. United States Smelting Refining & Mining Co., et al, 339 U.S. 186, 70 S.Ct. 537, 544 16

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REPLY AND BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

INTRODUCTORY STATEMENT

In the courts below, both The Danville Tobacco Association and some of its warehouse members resisted, through their respective counsel, the claims of appellant, Bryant-Buckner Associates, Inc., and filed briefs on both appeals to the Fourth Circuit. Only one answer and brief in opposition is filed to the Petition for a Writ of Certiorari, but such answer is signed by all of counsel who appeared in the lower courts on behalf of their respective clients, who are appellees in this case.

For sake of brevity, when the appellant and the appellees are referred to, their respective names will be abbreviated as follows:

B. B.	Bryant-Buckner Associates, Inc.
Danville Warehouse	Danville Warehouse Company, Inc.
D. T. A.	Danville Tobacco Association
Lea-Love	W. Townes Lea and Louie W. Love, trading as Piedmont Warehouse and Hughes Warehouse
Motley's	Blair Motley and Latney Motley, Partners trading as Motley's Warehouse
Producers	Producers Warehouse Company, Inc.
Virginia-Carolina	Virginia-Carolina Warehouse, Inc.
Warren's	J. I. Warren and W. C. Warren, Partners trading as Warren's
App.	Appendix to Petition
Big Sale	Warehouse of Bryant-Buckner Associates, Inc., built in 1962
Fourth Circuit	United States Court of Appeals for the Fourth Circuit
F. T. C.	Federal Trade Commission
Joint App.	Joint Appendix—Record No. 9136

At the conclusion of the first trial before the District Court, two questions had been resolved by its final order:

> 1. The manner of allocating selling time among the warehousemen operating on the Danville Market, including B. B., and an established schedule of such allocation for the years 1962 and 1963.
>
> 2. A permanent plan for the reallocation of selling time in the future whenever the entry of a new warehouse or an addition to an old warehouse required it, together with rules and regulations for the operation of the Danville Market and its warehouses.

Appellant B. B. appealed from the decision on both questions. The Fourth Circuit affirmed the District Court as to the manner in which selling time was divided and scheduled for the 1962 and 1963 seasons, holding that the anti-trust laws had not been violated. Appellant made no attempt to petition for a writ of certiorari as to this decision made by the Fourth Circuit. Judge Bryan, in the opinion of the Court on the first trial, said:

> "We affirm the District Court insofar as it concluded that the temporary 1962-1963 plan did not embrace any breach of the anti-trust statutes. We suspend provisionally the order establishing the permanent plan, . . ." App., p. A3.

In the opinion of the Fourth Circuit on the second appeal, Judge Bryan said:

> ". . . Throughout this discussion it must be recalled that B-B's allotment was initially fixed by the interim plan employed for 1962, and that it was taken into the permanent plan as it became effective in 1963."

In discussing the permanent plan in the opinion of the Fourth Circuit on the first appeal, seemingly it approved this plan as fair and reasonable, and argument was made in support of it; but being somewhat cautious for the reason that the question as to the validity of the permanent plan involved administrative procedure, the Fourth Circuit remanded the case, directing the District Court to refer the record to F.T.C. for its study and recommendation as as to this permanent plan. The F.T.C. filed a lengthy report, expressing the opinion contrary to the Fourth Circuit and other circuits that any restriction or limitation imposed upon a new entrant to the Danville or any other market which was not applied to old members of D. T. A. or a board of trade governing such market was unreasonable and violative of anti-trust laws. F.T.C. actually set up in its report a schedule for allocation of selling time on the Danville Market, revising the 1962-1963 schedule which had become final. Both the District Court and the Fourth Circuit, on the second appeal, rejected the report of F.T.C. and approved the permanent plan formulated by Fred S. Royster, Special Master, dated November 29, 1962, and printed at length in Joint Appendix, page 110a.

The only question that can be raised by appellant, if a writ of certiorari is awarded it, is one of questioned validity of the permanent plan and the incidental question as to its right to a gain in selling time for the year 1965 under the permanent plan.

The question as to the validity of the permanent plan is actually premature and moot for neither B. B. nor any other old member of D. T. A. has applied for additional selling time based on new construction, and no new entrant has appeared on the Danville Market since B. B. became a member in 1962.

Judge Bryan, in the opinion of the Court on the second appeal, said:

> "B-B's apprehension as to the permanent plan appears to be premature and presently academic. However, as a member, B-B may have a right to contest the District Court's declaratory judgment upholding the permanent plan as a regulation of the Association enforceable upon future applicants. For this reason and to avoid any chance of incompleteness in our adjudication, as well as for comparison of the prevailing plan with the F.T.C.'s suggested plan, we undertake a discussion of the permanent plan."

This reply will briefly argue the validity of the permanent plan and the invalidity and inappropriateness of the report submitted by F.T.C. But beforehand, the Court's attention is called to the treatment of this case by F.T.C. in the face of the opinion of the Fourth Circuit on the first appeal and the state of confusion deliberately or inadvertently created by the manner in which this case has been briefed and argued by B. B. in the District Court on the second trial and on the second appeal to the Fourth Circuit.

QUESTIONS PRESENTED IN PETITION

The stated confusion is clearly demonstrated in the first question presented in the petition (p. 2). Without knowledge of the steps taken in this action in two complete trials in the District Court and two appeals to the Fourth Circuit, the first question presented by the appellant would possibly appear reasonable and pertinent. But this question was decided by the District Court and its decision was approved and affirmed in its entirety on the first appeal. No application for a writ of certiorari from this decision was

made, and it became final. Appellant raises no question of jurisdiction of the court and appellees admit jurisdiction. The affirmed order of the District Court, dated June 16, 1962 (Joint App., 72a), allocating selling time to appellant, a new entrant, is not and cannot be claimed to be void. Accordingly, appellant is finally and completely bound by the schedule of allocation of selling time established by the District Court in said order, and said Question 1. (one), as stated in the petition, is not before this Honorable Court in appellant's attempted appeal.

In the first opinion of the Fourth Circuit, the Court suspended provisionally the District Court's order establishing and approving the permanent plan and remanded the action, "with directions to the District Court to seek the advice of the Federal Trade Commission upon the validity and administration of the permanent plan." (Pet., A3) Judge Bryan, in his opinion for the Court on the second appeal, stated in regard to the referral to F.T.C., directed in his first opinion:

> ". . . In its response, the Commission found the *permanent plan* less than 'reaonable, fair and equitable,' and devised a wholly new formula." (Pet., A19 —italics ours)

But Question 2. (two), as stated in the petition (p. 2), is not confined to the permanent plan but extends to the whole field as it existed before B. B. was allocated 724 baskets under the schedule adopted, approved and affirmed, as set forth in the District Court's order of June 16, 1962 (Joint App., 72a). Thus, it is seen that F.T.C. exceeded its authority and overruled the Fourth Circuit in holding that the 1962 allocation, including 724 baskets to B. B., was fair and reasonable, and attempted to include in its

report a schedule giving B. B. approximately a 30% increase in selling time over that allowed by the District Court based on a warehouse of 268,000 square feet instead of 165,000 square feet actually built, which schedule was unconditionally approved by the Fourth Circuit. F.T.C. should have confined its report and recommendation to the permanent plan which affects alike all warehousemen on the Danville Market, including B. B. Accordingly, it is seen that F.T.C. has confused and confounded the two questions before the District Court in the beginning, one of which has been finally decided, and the other of which is confined only to the permanent plan which is before this Court on the petition and this reply.

Question 3. (three), expressed in bad taste and disrespectful of the federal judiciary and its established procedure, should not have been presented in the petition. Furthermore, this contention is hardly worthy of serious consideration. Mr. Royster previously had been recognized as a reliable authority on tobacco auction marketing and the conditions existing on the various market. See *Rogers* v. *Douglas Tobacco Board of Trade* (1957), 5 Cir., 244 F. 2d 471, 473. Appellees can make no better reply to this contention than did the Fourth Circuit in its first opinion wherein it said:

> "III. To impeach the decrees, attack is mounted by B-B upon the ground that the master appointed by the District Court was unqualified and disqualified. The argument is utterly unsound. It wholly misconceives his place in the suit. Besides, the appointment was made with the full knowledge and consent of B-B, even to the selection of the person to be master. True, he was not a lawyer, but the Federal Rules of Civil Procedure contain no such requirement. Rule 53(a).

"He was an official of the Bright Belt Warehouse Association who had testified in the case before his appointment and who testified thereafter. If B-B may object despite its contrary representation to the Court, still there was no error in his appointment and service. 'Master' was a misnomer. In truth he did not serve as a master in the sense of being a commissioner of reference or master in chancery. He did not take evidence; he did not resolve any factual disputes; he made no rulings of law. Impressed with his marked knowledge in tobacco marketing, demonstrated in his testimony, the Court chose him as an expert for its guidance. He was subject to questioning as a witness before and after his counseling advice to the Court. Rightfully, and with every propriety, he expounded to the Court and the parties the techniques of the subject in suit.

"It is a practice frequently resorted to in litigation, especially in patent and scientific cases. See Scott v. Spanger Bros., Inc., 298 F. 2d 928, 930 (2 Cir. 1962). Incidentally, he served without compensation and even enlisted the aid, on the same basis, of a competent and disinterested attorney to help him propound his views. All of this was known to the Court and to every party, without the slightest reservation by any of them, including B-B.

"The aspersions deliberately directed at the master in the briefs of B-B's counsel, attempting to impugn his motives, and the disparaging references to the trial judge, are entirely unfounded. We deplore such tactics and condemn them."

APPELLANT HAS NOT COME INTO COURT WITH CLEAN HANDS

This action is fundamentally a chancery proceeding, and the rules and maxims in such proceedings are applicable in this case. B. B.'s petition, at page 9, states:

> "All of Bryant-Buckner's allotments were calculated on its actual warehouse area, namely, 168,280 square feet; see district court order of July 7, 1962, at JA 94a; BB 19, n. 2; Federal Trade Commission's proposals at BB 36 and BB 37. The statement twice repeated in the second opinion of the court below (*infra,* pp. A24, A29), that Bryant-Buckner's allotments are calculated on the basis of the 268,792 square feet it has contracted to build rather than on the 168,280 square feet it has actually built, is contradicted by the cited record references."

This statement is not only misleading but is incorrect. The record shows that B. B. was released by its contractor of excess building of Big Sale Warehouse over 165,000 square feet, and that the District Court calculated B. B.'s selling time for the 1962 season based on a warehouse with a floor area of 268,792 square feet when this floor area was in actuality only approximately 165,000 square feet.

During the hearing on May 12, 1962, the District Judge said:

> ". . . A question arose in the discussion as to 'B & B' as to whether or not this can be done. The contract is for 262,500 feet but in an effort to work out a plan for 1962, it was the Court's view that it would not damage any of the present warehousemen if instead of building the larger building, that if they built on the basis of 165,000 feet that we should probably let them have an allotment of 734 baskets less a figure of seven baskets (a forced figure for the purpose of equalizing) to make the total come within the 8,800 baskets, which would give 'B & B' 726 baskets." (Joint App., 330a, 331a)

During the hearing on June 16, 1962, Mr. B. Andrew Davis, of counsel for B. B., said:

> "Now since we were here, if Your Honor please, it develops that we can't stop at 165,000. We are compelled from an economic standpoint—The contractor won't let us stop. We are compelled to build 265,000 square feet, and the allotment that was proposed on the basis of 165,000 square feet is not, in the opinion of Bryant-Buckner, reasonable and adequate and fair. That is the only reply that I want to make to Mr. Wheatley and Mr. Meade. We have never acted in disposition—never taken any position but in absolute good faith. If we had been able—we thought we could—if we had been able to cut our building back to 165,000 square feet, we would certainly have gone along and insisted that the 1962 allotment be accepted, but it develops that we can't do that, and Bryant-Buckner feel that the proposed allotment for '62 would not be reasonable and fair and adequate under those conditions. That is the only thing I have to state as to what we have agreed to and haven't agreed to." (Joint App., 394a, 395a)

In the order of the District Court dated July 7, 1962, in Joint Appendix, 94a, 95a, it is first stated:

> "This day came defendant Bryant-Buckner Associates, Inc., by counsel, and announced to the Court that it had been successful in reducing its commitments to its general contractors for the construction of its new warehouse for operation on the Danville tobacco market, so that when said warehouse is completed for use during the 1962 season it will contain approximately 165,000 square feet."

This order then recites the facts that at a special meeting of the members of D. T. C., held on June 28, 1962, fol-

lowed by a meeting of its Sales Committee on the same date, the membership approved the schedule for allocating selling time on the Danville Market for the 1962 season, established by the Court in its order of June 16, 1962, and that said Sales Committee had actually set up a schedule for the sale of tobacco at auction in the warehouses on said market, including an allotment of 724 baskets to B. B., and upon said facts decreed, ". . . that the Court doth approve of the reduction in floor space of the warehouse of Bryant-Buckner Associates, Inc. from 268,500 square feet to approximately 165,000 square feet, with the allocation of 724 baskets to it based on its reduced floor space of approximately 165,000 square feet for the 1962 season, . . ."

The quoted language of the District Judge, counsel for B. B. and the decree of July 7, 1962, clearly demonstrate that the above quoted statement in B. B.'s petition, at page 9, is entirely erroneous, and that B. B. actually was given a larger allotment of selling time than calculations on a floor space of 165,000 square feet entitled it to.

Had B. B.'s allocation been limited to its actual floor space of 165,000 square feet, with a full allowance for every square foot and without any restrictions, the baskets allotted (724) would have been practically the same as those allowed under the 1962 schedule, calculated upon the premise that Big Sale Warehouse would contain 268,782 square feet. Five years have passed since the 1962 allocation and there has been no addition to Big Sale or new warehouse construction by B. B. Each year, in March, the Sales Committee of D. T. A. has allotted 724 baskets to B. B. for the coming season, and during each season over said period it has operated its warehouse with this allotment.

B. B., supported by its petition, has not come into this Court with clean hands.

REASONS FOR REFUSING WRIT

The history and background of the unusual type and method of operation of the business of auction sales of bright leaf tobacco is clearly explained and described in Special Master's report (Joint App., 110a) and the two opinions of the Fourth Circuit.

It has been firmly established by the Fourth Circuit in said two opinions and cases cited therein that reasonable restraints upon new entrants on a bright leaf tobacco auction market do not violate anti-trust laws. In the case before this Court, both the District Court and the Fourth Circuit have held that the restrictions imposed upon appellant in establishing and approving the 1962 schedule of selling time do not embrace any breach of the anti-trust statutes. The decision of the Fourth Circuit on the first appeal, from which no petition for certiorari was filed, puts at rest any claim of appellant to a revision of the 1962 allocation for its benefit. The validity of the permanent plan, sometimes called the "Royster" plan or the "Danville" plan, is the only question now before this Court.

The appellant refers more than once to the original plan proposed by D. T. A. and the extent to which it would share in selling time under it, but this original plan is entirely extraneous to this appeal, and significantly, it was declared violative of anti-trust laws in the beginning of this action, upon B. B.'s vigorous opposition.

Appellant principally relies upon the reports of F. T. C. to reverse the well considered opinions of the District Court and the Fourth Circuit in this action.

F.T.C. REPORTS

The referral to F.T.C., directed by the Fourth Circuit, was only for the purpose of seeking the advice of the Com-

mission upon the validity and administration of the *permanent plan,* for it was stated in the first opinion that, "The orders of the District Court entered in regard to the 1962-1963 selling seasons are affirmed . . ." The Fourth Circuit did not direct that F.T.C. consider and express an opinion as to whether the restriction or limitation placed upon B. B. when it became a member of D. T. A., in 1962, violated anti-trust laws. Yet F.T.C. undertook in its report to express an opinion that any restriction violated anti-trust laws and that a new entrant should be treated precisely as an old warehouseman who had contributed to the buildup of the Danville Market as the second largest in the world. Furthermore, F.T.C. offered a plan or scheme of reallocation of selling time among the warehousemen on the Danville Market, including B. B., so as to radically change said original allocation to greatly benefit B. B.

The whole record in this action was forwarded to F.T.C., but no additional testimony was introduced before it, upon its consideration, and no hearing of any description was held, after convening the parties. In addition to the record, only statements requested of D. T. A. as to the size, type of construction and availability of warehouses on the Danville Market were considered by F.T.C. in making its report to the District Court.

When the original report of F.T.C. was received by the District Court at Danville, the Judge thereof wrote a letter under date of September 9, 1965, to F.T.C., requesting it to supplement its report relative to the allocation of selling time to tobacco auction warehouses by applying its recommendations to the Danville case. Thereafter, a supplemental report was forwarded by F.T.C. to the District Court at Danville, wherein F.T.C., in applying its proposed modified "Danville" plan, made an analysis

of the Danville Market and proposed an entirely different formula for allocation of selling time among the warehouses, including Big Sale, for the 1962 season and future seasons, thereby confounding the finally established schedule for selling time during the 1962 season with allocations for future years under a permanent plan. This analysis made by F.T.C. is found on pages 34 and 35 of B. B.'s Appendix to Brief, filed by it on second appeal.

The approach of F.T.C. in its original report to the District Court treated with two other cases and was couched in such general language that District Judge Dalton felt compelled to ask F.T.C. to file a supplementary report applying its recommendations to the Danville case only. The analysis of the Danville Market by F.T.C., in its supplemental report, predicated upon equality among new entrants and old warehousemen alike, is so involved that it is difficult, if not impossible, of understanding by judges as well as lawyers. The final result reached by F.T.C., based upon this equality, furnishes a new schedule for 1962 and for future years until there is new warehouse construction on the Danville Market.

Danville Warehouse, owner of four separate warehouses, with a total square footage of 296,453, and the oldest warehouse operator on the Danville Market, was allocated 1601 baskets per day under the 1962 allocation schedule approved by the District Court and finally approved and affirmed by the Fourth Circuit. Danville Warehouse in the past had not contributed to excessive warehouse construction but had actually demolished or disposed of two other warehouses which it had owned and had surrendered to D. T. A. the allotments which had been made to and used by it in the operation of said two warehouses. For some unknown reason or not understandable if given,

F.T.C., in its proposed modified allocation schedule, took from Danville Warehouse 251 baskets per day and increased the 1962 approved allotment to B.B. for its Big Sale Warehouse exactly 251 baskets. There was less severe adjusting and juggling of allotment figures among the other warehouses on the Danville Market.

If F. T. C.'s supplemental report should be accepted and applied, the result produced would be (1) an overruling of precedents established in the Fourth and other Circuits that reasonable restrictions on a new entrant to a bright leaf tobacco market do not violate anti-trust statutes; (2) an abuse and disregard of the mandate of the Fourth Circuit in its first opinion; (3) a reinstatement of a question finally decided by the Fourth Circuit, to which no petition for a writ of certiorari was filed; (4) an acceptance of an allocation schedule which is flagrantly prejudicial, unfair, inequitable and arbitrary as to one party in interest and at the same time highly beneficial, favorable and partial to another party in interest; and (5) the adoption of a scheme or plan, the reasons for which are not only ambiguous but are not understandable.

Appellant, on page 19 of its petition, states:

> "*Fifth.* Simply to show that the point has not been overlooked, we note that the first judgment of the court below directed a remand and a reference to the Federal Trade Commission (Appendix C(1); *infra,* p. A31); it was therefore not a final judgment. Consequently all of the points raised on the first appeal to the court below remain open now on review of the second appeal. *United States* v. *United States Smelting Co.,* 339 U.S. 186."

If we paraphrase this quotation so as to apply to the action before the Court, the appellant notes that the first

judgment of the Fourth Circuit directed a remand and a reference to the Federal Trade Commission, and therefore, its judgment was not a final judgment, and for that reason, all points raised on the first appeal to the Fourth Circuit remain open now on review of the judgment of the Fourth Circuit on the second appeal.

This statement completely disregards the constant fact from beginning to end that there were two questions to be resolved: (1) whether the 1962 allocation schedule was reasonable and therefore not violative of anti-trust statutes; and (2) the validity of the *permanent plan* treating with the allocation of selling time to be made in the future when a new entrant comes on the Danville Market or an old warehouseman constructs a new warehouse or makes a new addition to his existing warehouse. These two questions were treated separately in the District Court and in the Fourth Circuit on the first appeal, where Judge Bryan made it both clear and emphatic that the affirmation of the District Court's decision on the validity of the 1962 allocation was a final determination of that question and at the same time stated that the Court suspended provisionally the order establishing the permanent plan and remanded the action with directions to the District Court to seek the advice of F.T.C. upon the *validity and administration of the permanent plan.*

The only case cited in support of the quoted language of the petition with regard to the finality of the judgment of the Fourth Circuit is *United States et al* v. *United States Smelting Refining & Mining Co., et al,* 339 U.S. 186, 70 S.Ct. 537, 544, in which the Court said:

> "Finally it is contended that the District Court judgment should be affirmed because there was no appeal from the judgment and mandate when the case

was sent back to the Commission, the court having found that there was no evidence to sustain a Commission finding that the line-haul rates were not compensatory for the services rendered. Appellees argue that that decision became the law of the case.

"The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter. (Citing cases) It is not applicable here because when the case was first remanded, nothing was finally decided. The whole proceeding thereafter was *in fieri*. The Commission had a right on reconsideration to make a new record. (Citing cases) When finally decided, all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, notwithstanding its interlocutory character, had made it appealable. 28 U.S.C. § 1253, 28 U.S.C.A. § 1253. The appellants might have appealed, but they were not bound to. We think that it requires a final judgment to sustain the application of the rule of the law of the case just as it does for the kindred rule of *res judicata*. (Citing cases) And although the latter is a uniform rule, the 'law of the case' is only a discretionary rule of practice. It is not controlling here. (Citing cases)"

The case cited by appellant to support its aforesaid conclusion is not an authority for declaring under the facts of the action before the Court that the adjudication of the validity of the 1962 allocation schedule by the Fourth

Circuit, in its first opinion, is not a final order or decree.

It is respectfully submitted that for the reasons stated in this reply and brief a petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 26, 1967

ADDENDUM

By reason of the peculiar nature of the tobacco auction business, and in order to acquaint the Court with some of the background of this case, an addendum is appended to this Reply Brief, as follows:

Factors Controlling Selling Time

Leaf tobacco is sold on the warehouse floor on the Danville Market after it has been loaded or piled on a flat woven slat basket approximately 3½ feet square. It is recognized in the tobacco warehouse business that 20 square feet of warehouse floor space is consumed by each single basket of tobacco (App. 237a).

Selling time on the Danville tobacco market is expressed in terms of these baskets or piles of tobacco.

The total number of baskets, or piles, of tobacco available each day for allocation among the several warehouses is determined by several factors.

Tobacco cannot be efficiently judged except in proper light. Therefore, selling hours are limited to 5½ hours. Also, the factor of buyer fatigue makes any longer selling day inadvisable (Joint Appendix, first appeal, 303a).

It has been determined that in fairness to buyer, tobacco grower and warehouseman alike, the maximum speed at which the auctioneer should cry and sell tobacco on the warehouse floor is 400 piles per hour.

The 5½ hour day and the 400 pile per hour limit are set by the Sales Committee of the Bright Belt Warehouse Association, Inc., a voluntary association made up of tobacco warehousemen located in the area in which bright tobacco is grown and sold (Virginia, North Carolina, South Carolina, Georgia and Florida).

On the Danville market there are four sets of buyers; that is, each of the buying companies sends to the Danville

market four buyers. These buyers follow the sales in sets, a set being made up of one buyer representing each of the buying companies.

One set of buyers working the 5½ hours per day during which the piles or baskets are sold at the rate of 400 piles per hour, will buy 2,200 piles or baskets of tobacco (5½ X 400).

The four sets of buyers on the Danville market, therefore, will buy 8,800 piles, or baskets, per day; and these 8,800 piles, or baskets, represent the total "selling time" available on the Danville market for allocation and distribution among the operators of the Danville warehouses.

With 20 square feet being required to sell each single pile of tobacco, the 8,800 daily piles of tobacco could be sold on approximately 176,000 square feet of warehouse floor space; and in any event 100,000 square feet for each of the four sales per day or 400,000 square feet "would be ample" to sell the 8,800 piles per day on the Danville market (Joint Appendix, first appeal, 201a; 237a).

Thus, it may be seen that the necessity of allocating selling time among the several warehousemen on the local markets arises from many and varied reasons beyond the control of the local boards of trade and the Danville warehousemen.

For a fuller explanation of the reasons that many factors involved in the auction sale of leaf tobacco are beyond the control of the boards of trade and the warehousemen, see footnote 3 to the opinion in *Rogers* v. *Douglas Tobacco Board of Trade* (1957), 5 Cir., 244 F. 2d 471, 473, which Judge Rives said were "clearly and succinctly stated."

Floor Space Method of Allocating Selling Time

For some years previous to 1962, the total selling time available to the Danville tobacco market had been divided among the warehousemen on the basis of the ratio of floor

space of their respective warehouses to the total market floor space. It had become increasingly apparent during the years immediately preceding this litigation that the floor space system had serious defects, but none more menacing than the continuing increase of floor space by the warehousemen in order to increase their several proportions of selling time, rather than to meet any need for additional floor space on which to market tobacco. This continual over-building, frequently referred to as "building wars" had begun to threaten seriously the very existence of the tobacco auction market and thoughtful and responsible persons concerned with the marketing of tobacco realized that the situation had reached the point where there must be some restraint on operations in order to bring this devastating economic warfare under some reasonable control.

In the earlier days of restricted selling time, the problem was not so acute because there was no general surplus of warehouse space and because World War Conditions and their aftermath, from 1941 to approximately 1947, made the obtaining of building materials difficult. In those earlier days, the warehousemen on the market were either able to reach an agreement among themselves or they took the easiest course to solve the controversy by the allocation of selling time according to available warehouse floor space. This is the so-called "floor space system" which was almost universally prevalent until the late 1940's and was widespread at the time this litigation was commenced. When building materials became available and credit became easier in the late 40's and early 50's, and thereafter, there was an epidemic of new tobacco warehouse construction.

Events Immediately Preceding Litigation

The events which precipitated this litigation occurred early in the year 1962.

Appellant Bryant-Buckner Associates, Inc., joined the Danville Tobacco Association in February 1962 prior to the allocation of selling time in March for the 1962 sales season. At about the same time a spokesman for said Appellant was quoted in the local press as saying it was commencing construction on a warehouse consisting of approximately 167,000 square feet, which would be Danville's third largest tobacco warehouse (Joint Appendix, first appeal 195a).

Also, J. I. Warren and W. C. Warren, trading as Warren's Warehouse, who had been members of the Association and operating warehouses on the Danville market for a number of years, were commencing construction of a new warehouse with additional floor space of 140,529 sq. ft.

In making application to the Association for selling time for the 1962 sales season Appellant Bryant-Buckner Associates, Inc., first applied for selling time based on a warehouse consisting of 420,000 square feet, then later increased this to 500,000 square feet. Mr. C. D. Bryant, President of Appellant, testified that he read a letter to the Sales Committee of the Association which stated that it had been the intention of Appellant to apply for selling time on the basis of floor space of 165,000 square feet, but that due to the amendment in the by-laws which took place as of March 12, 1962, it was applying for selling time on the basis of 420,000 square feet. In his testimony Mr. Bryant was somewhat evasive and hard to pin down (Joint Appendix, first appeal 254-268) and in the course of it he mentioned 160,000 square feet, 161,000 square feet, 165,000 square feet, 250,000 square feet, 265,000 square feet, 420,000 square feet and 500,000 square feet in referring to the size of the warehouse Appellant might build for the 1962 sales season.

Association's Proposed New Method of Allocating Selling Time

Mr. Bryant claimed that the reason for the uncertainty as to the size of Appellant's proposed warehouse was the

new by-law change which would allow a new warehouse coming on the Danville market a credit of selling time of 40% for the first year and 15% additional for each year thereafter until 100% credit was reached.

The resolution adopting the new by-law, passed March 12, 1962 by the Association was never put into effect, but instead this litigation was commenced by a petition filed in the District Court seeking a declaratory judgment upon the validity under the Federal antitrust statutes of the proposed new by-law alloting selling time for the upcoming 1962 sales season, which would commence in September 1962.

The District Court held the new by-law of the Association to be "not in accordance with the law and * * * unfair and unreasonable."

District Court's Plan for 1962-1963

At the time of the District Court's disapproval of the Association's new by-law of March 12, 1962, the opening of the 1962 sales season was only a few months away (the Danville sales season opens around the middle of September each year) and it was apparent to the District Court and all parties concerned that, since the new by-law could not be properly used to allocate the selling time for the coming season, it was imperative that some workable and fair formula for the allocation of selling time to be used in the upcoming 1962 sales season be arrived at without delay.

At the instance of the Association and its warehouse members the District Court retained the cause and proceeded to formulate a plan of allotment for the 1962 season, and by its order of June 16, 1962, outlined a plan for the 1962 season which it considered acceptable, and which was adopted by the Association at a meeting on June 27, 1962.

The District Court's order of June 16, 1962 portioned out the selling time by this formula: the entire warehouse

floor space of the 1961 Danville market comprising 1,400,-450 sq. ft., was divided by the number of warehouses, then 16, reaching an average size of 87,527 sq. ft. This became the unit of space. With the addition of 140,000 sq. ft., added by the old member and 268,792 asked by B-B the total became 1,809,242. Division of this new total by the unit of 87,527 gave approximately 21 units. This meant that each unit carried with it 419 baskets (8,800 divided by 21).

Following substantially a schedule proposed by counsel for the Producers Tobacco Company, Incorporated, one of the warehouse parties to the suit, Bryant-Buckner Associates, Inc. (B-B), the new entrant, was awarded credit in full (419 baskets) for the first unit, 50% thereof for the second unit, and 25% for the third unit. B-B had contended it was bound by a construction contract to build a warehouse of 268,792 sq. ft. Later this claim was reduced to 165,000, the Court believing this area adequate in view of the fact that 400,000 sq. ft., had been quoted as sufficient to accommodate the entire market sales. This was done with the consent of B-B. However, in applying the formula the larger floorage was used, although the much lesser floorage of 165,000 feet, more or less, was actually built, thus saving B-B a capital expenditure for some 100,000 sq. ft.

On the basis of the larger floorage of 268,792 sq. ft., B-B was allowed a full credit of 419 baskets on the first unit of 87,527 sq. ft., 210 on the second and 105 on the third, an aggregate of 734. Slight adjustments resulted in a final figure of 724. After deduction of this number and the disallowance of a portion of the additional quota asked by the old member (Warren) on the basis of its new construction, the remainder of the basket-maximum was distributed on the floor space percentages of 1961.

In the formulation of this plan the Court was assisted by counsel appearing for various parties, and there was necessarily some give and take between them.

The Permanent Plan

At the instance of the Association and its warehouse members, the District Court retained the cause still further for the purpose of arriving at an acceptable plan for the allotment of selling time for the 1963 sales season and the years thereafter; and on May 12, 1962, the Court appointed Fred S. Royster as Master to report to the Court upon findings of fact and conclusions as to the issues presented in the case and particularly a formula for the allotment of selling time for the tobacco warehouses in the Danville area for 1963 and subsequent years (Joint Appendix, first appeal 54a, 55a).

The Master, so appointed filed his report on November 29, 1962, in which he recommended a permanent plan of regulations for the allocation of selling time on the Danville market. The District Court confirmed this report and recommended that the plan set forth therein be adopted by the Association. B-B excepted to the report. The Association adopted the permanent plan on March 16, 1963, at the usual time (second Tuesday in March) the Association adopted its schedule for the allotment of selling for the upcoming sales season commencing in September of each year. Later, the Association voted to continue the 1962 plan in effect for the 1963 season and to postpone the effectiveness of the permanent plan until the 1964 season, in keeping with a Supplemental Report of the Master so recommending for reasons stated therein, which was aproved by the District Court. Thereafter, the 1962 plan has been referred to as the 1962-1963 plan.

The permanent plan sometimes also known as the "Danville Plan" provided for the allocation of selling time on a combination unit and performance system. Under this plan the number of warehouses on the Danville market was first divided into the total warehouse floor space on the market in order to arrive at an average unit of floor space per warehouse. This produced an average unit of space of approximately 87,500 sq. ft.

Then, under the permanent plan, a new entrant would be accorded a credit of 75% for the first unit of space in his warehouse (75% of the first 87,500 sq. ft.); a credit of 50% for the second unit (50% of the second 87,500 sq. ft.); and a credit of 25% for the third unit and all additional units, if any, in excess of three.

Likewise, should any added units be constructed on the market by a warehouseman already on the market, either by the addition to an existing warehouse, or a new structure, credit would be given as follows: for each unit of 87,500 sq. ft., added to an existing unit of 87,500 sq. ft., a credit of 50% for such added space; and for each unit of 87,500 sq. ft., added to exising space of 175,000 sq. ft. (2 units) a credit of 25% for such added space.

In all computations under the plan a fraction of a unit, less than 87,500 sq. ft., would be given a proportionate credit.

In addition, the permanent plan made provision for a plus or minus of 8% gain or loss based upon performance during the preceding sales season.

First Appeal

The 1962-1963 plan evolved by the District Court and the permanent plan recommended by the Master and approved by the District Court (both adopted by the Association)

were the subject of the first appeal in this case to the 4th Circuit Court of Appeals.

The case was heard in the 4th Circuit Court of Appeals on January 14, 1964 and decided on May 14, 1964, the decision being reported as *Danville Tobacco Association v. Bryant-Buckner Associates, Inc.*, 333 F. 2d 202.

On the first appeal the Court reviewed the permanent plan approved by the District Court for 1964 and subsequent years and stated that the authorities approve the kind of restrictions contained in the permanent plan when reasonable. However, this Court suspended pro tempore so much of the decree of the District Court as finally approved the permanent plan, and remanded the cause with directions to the District Court to refer the permanent plan forthwith to the Federal Trade Commission, requesting it "to investigate and advise the Court upon the validity of the proposed plan or to prescribe an appropriate plan."

Proceedings on Remand

Pursuant to the remand mandate of the Court of Apeals the matter was referred, in July 1964, to the Federal Trade Commission with request by the District Court that comments and advice be given as to the propriety of the prospective plan.

A report of 24 pages was made by the Federal Trade Commission in May, 1965.

Because of difficulty in determining just what the Federal Trade Commission advised with respect to a prospective plan of operation, the District Court requested the Federal Trade Commission to clarify and make more specific its Report and advice, if it cared to do so.

Thereafter, on October 16, 1965, the Federal Trade Commission furnished to the District Court a Supplemental Re-

port of 8 pages making certain recommendations. The First Report and the Supplemental Report of the Federal Trade Commission are in the record (App. for Appellant, present appeal, pp. 15 et seq. and 32 et seq.).

After notice to all of the parties to the proceedings, there was a hearing on November 1, 1965, on Exceptions which had been filed to the Reports and Recommendations of the Federal Trade Commission.

After hearing all parties who desired to be heard, the District Court entered an Order referring the matter of the Federal Trade Commission Reports and Recommendations to Mr. Fred S. Royster, the Special Master, for study and comment and recommendations.

The Second Report of Special Master Royster was filed on December 1, 1965, and is printed at pages 38 to 52 in Appendix for Appellant, this present appeal.

After notice to all of the parties, there was a hearing at Danville on January 21, 1966, on the subjects of the Federal Trade Commission Reports and Recommendations, the Special Master's Reports and Recommendations, and the action to be taken by the District Court. All of the parties and persons desiring to be heard were heard at that time and place.

Judgment of District Court

On February 9th, 1966, the District Court rendered its final judgment in the language as follows:

> "That the Court declares as its Declaratory Judgment that the allocation of selling time and the handling of selling time as recommended in the First and Second Reports of the Special Master and as heretobefore adopted by the Danville Tobacco Association and as now in effect constitute a proper and legal manner of

allocating selling time both as to the warehousemen now on the Danville market and as to a new entrant who may present himself thereafter; and that said regulations are not illegal or improper and are not unreasonably discriminatory and do constitute proper and legal method of allocating such selling time for the tobacco season of 1966-67 and for future seasons thereafter and until they may be changed in whole or in part by proper action of the Danville Tobacco Association or its successor, or by proper decree of a Court with jurisdiction over the matter."

It is from the above Judgment of the District Court that Appellant took its second appeal, and on the second appeal the 4th Circuit Court of Appeals affirmed the judgment of the District Court, and this action by the 4th Circuit Court of Appeals is the basis for the petition for a writ of certiorari.

Permanent Plan Is Fair and Reasonable

This Court, including the former appeal in this case and the Fifth Circuit as well, have heretofore clearly recognized the rightfulness of a diminution as to a newcomer on the market. *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F. 2d 502 (4th Cir. 1959); *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 294 F. 2d 619 (4th Cir. 1961); *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d 471 (5 Cir. 1957); *Rogers* v. *Douglas Tobacco Board of Trade*, 266 F. 2d 636 (5th Cir. 1959); *Danville Tobacco Association* v. *Bryant-Buckner Associates, Inc.*, 333 F. 2d 202.

There are several acceptable and sufficient reasons why a new warehouse entrant on the Danville market should be limited to some extent as to the amount of selling time initially allotted to him.

The older warehousemen have for many years spent a great deal in time, effort and money to build up the Danville

market—in advertising and promoting the market through personal contacts, through road signs, newspapers and radio, until it has reached a top position among tobacco auction markets and has earned an excellent reputation for fair dealing with farmers and buyers. To none of this has the newcomer contributed, yet he reaps the benefit of these years of effort and must get his selling time through decreases in the selling time of the existing warehousemen, since there is no other place for it to come from. In the case of the grocery business or the professions and most other lines of endeavor, a newcomer opens a store or an office and has to attract customers, or clients, or patients, by his own worth, or ability, or enterprise. Those already in business do not have to hand him free on a silver platter a supply of customers or clients, to set him up in business. Yet, that is just what happens when a newcomer enters a tobacco market, regardless of his experience, ability or worth.

The marketing of tobacco, therefore, cannot be equated to the grocery business, the professions, hotels, office buildings, or indeed to any other business; but must be regarded as unique with respect to the controls and restrictions which must be placed upon it.

These Appellees do not contend that a newcomer should be or could be, excluded from the market, or unreasonably limited as to an allotment, but on the other hand no individual, group of individuals, or corporation can claim the right, just because they may happen to be in financial position to do so, to create a situation where some of the pre-existing operators may be literally forced out of business, which has happened on some other markets (Joint Appendix, first appeal, 284a).

The Danville market is presently saturated with warehouses and floor space to the point of being on the brink

destruction. Therefore, for the welfare of all, the farmer, the buyer, the public and the warehouse business, some regulation and control of future building of or additions to warehouses, applying to existing warehousemen as well as to newcomers, is not only reasonable, but imperative (Joint Appendix, first appeal 305a).

The Special Master's Plan, adopted by the District Court for 1963, and subsequent years, which is a combination of unit floor space and experience or performance, is admittedly not perfect—it is not even claimed by its author to be so (Joint Appendix, first appeal 300a)—but it is reasonable to believe that it will prevent a runaway, chaotic condition from descending upon the Danville Market, which was imminent at the time the Petition for Declaratory Judgment was filed in this cause and which has happened elsewhere in the Bright Belt for the lack of such a control plan (Joint Appendix, first appeal 284a; 300a; 305a).

The Special Master showed that he was familiar with pertinent prior court decisions in which various aspects of tobacco marketing were involved and the plan he recommended shows plainly that he took guidance from them in order that the plan would conform to the ruling principles established by the Courts.

It is pertinent at this point to observe that, in any event, the District Court has not in fact forced on anyone the plan for 1963 and subsequent years. It has done no more in effect than to say to the Danville warehousemen that it decrees the plan to be fair and reasonable and they were willing to adopt it for that reason. It has not said that it is the only plan conceivable that would be fair and reasonable, or that there may not be others that would be better.

These Appellees also contend that the plan for 1963 and subsequent years, while not entirely satisfactory to them in all respects, is reasonable and perhaps as good a plan as

might have been arrived at. Certainly it is better than the warehousemen, left to their own devices, could devise. Common sense dictates that a bona fide attempt to live under it for a reasonable length of time should be made by all concerned. If experience under it should not prove its now apparent virtues, it can be amended or supplemented as the need may arise.

Previous Circuit Court of Appeals Ruling Upon Reasonable Restraint Upon Allocation of Selling Time

Appellants freely admit that both the Fourth and Fifth Circuit Courts of Appeal have consistently held that a reasonable diminution of selling time allocated to new warehouse construction in a market is not an unreasonable restraint of trade. *Rogers* v. *Douglas Tobacco Board of Trade,* 244 F. 2d 471 (C.A. 5); *Rogers* v. *Douglas Tobacco Board of Trade,* 266 F. 2d 636 (C. A. 5); *Asheville Tobacco Board of Trade* v. *FTC,* 263 F. 2d 502 (C. A. 4); *Asheville Tobacco Board of Trade* v. *FTC,* 294 F. 2d 619 (C. A. 4); *Roberts* v. *Fuquay-Varina Tobacco Board of Trade,* 332 F. 2d 521; *Danville Tobacco Ass'n* v. *Bryant-Buckner Associates,* 333 F. 2d 202 (C. A. 4) and *Danville Tobacco Ass'n* v. *Bryant-Buckner Associates,* C. A. 4, No. 10579.

Appellants, however, point out that it is an unreasonable restraint to foreclose competitors from a substantial part of the market. With this we agree, particularly where the motivation and intent is to reduce or exclude competition. To support their contention that the Fourth and Fifth Circuit Courts of Appeals erred in the above cited cases, the Appellants cite *Bale* v. *Glasgow Tobacco Board of Trade,* 339 F. 2d 281. The plan for the allotment of selling time in this case was vastly different from those con-

sidered in the above cited cases considered by the Fourth and Fifth Circuit Courts of Appeals. In the Bale case the Glasgow Tobacco Board of Trade adopted a regulation which limited the selling time of a new warehouse to 20% of the selling time which would have been allotted to the warehouse on a basis of a floor space allotment system (where a warehouse receives that proportion of the selling time which its floor space bears to the total floor space in the market). The Glasgow Board of Trade regulation provided that the new warehouse would thereafter receive annually an additional 20% of the selling time which would have been allotted under the floor space allotment system until the new warehouse, after five years, was on a parity with the other warehouses in the market. The Court held:

"We are of the opinion that the purpose and intent of the twenty percent rule was to preserve the status quo and suppress competition. . . .

". . . As heretofore stated, the question of whether a restraint is reasonable or unreasonable depends on the particular facts of each case. . . ."

Obviously, the factual situation with which the Sixth Circuit Court of Appeals dealt in the Bale case is so different from those considered by the Fourth and Fifth Circuit Courts of Appeal, that the Bale case has no relevancy to the case at bar, nor is it in conflict with the decisions of the Fourth and Fifth Circuit Courts of Appeals. In fact, The Danville Tobacco Association, in an effort to deter wasteful building wars, adopted a regulation similar to that adopted by the Glasgow Tobacco Board of Trade in the Bale case, whereby new warehouse space would be allotted 40% of the selling time allotable under the floor space allotment system with an annual 15% increase. The

District Court held that this regulation unreasonably restrained trade, and proceeded to formulate the regulation which is the subject matter of this case.

Appellants further cite *Gamco, Inc.* v. *Providence Fruit & Produce Bldg.*, 194 F. 2d 484, in support of their contention that the regulations of the Danville Tobacco Associations are an unreasonable restraint upon trade. This case, however, deals with a produce market where there was a complete exclusion of competition from the market, and thus has no relevancy to the case at bar nor does conflict with the decisions herein cited of the Fourth and Fifth Circuit Courts of Appeal.

Upon the first appeal of the case at bar (333 F. 2d 202), the Fourth Circuit Court of Appeals held that it would not be an unreasonable restraint of trade for the Danville Tobacco Association to operate under its permanent plan until the FTC could review the plan.

In fact the Court, then, did not disapprove the permanent plan in its first opinion; but rather it would seem from this Court's comments on the permanent plan as a whole, that the permanent plan might be an acceptable plan, but that the Court's outright approval should be withheld pending some further exploration and study to ascertain whether or not it could be improved. The Court indicated its feeling that neither the 4th Circuit Court nor the District Court possessed the expertise to enable either to be sure that the permanent plan was the best that could be devised under the circumstances of this case. Hence, although the Court already had the benefit of the advice and recommendations of Mr. Royster, who perhaps has an expertise quoad tobacco marketing second to none, the Court nevertheless deemed it salutary to see if any additional help could be had from the FTC.

FTC's Assignment

These Appellees do not apprehend that the Court intended the FTC to act without any limitation whatsoever in performing its assignment.

It is reasonable to conclude that this Court might have had in mind that some help might be had from the FTC on the question whether the 75% limitation on the first unit of the new entrant was too much of a limitation; or whether the 50% and 25% limitations should be increased or decreased as to a new entrant or to an old member of the market seeking additional construction; or as to whether the 8% gain or loss limitation was too much or too little. But it is not reasonable to conclude that this Court had in mind that the FTC would undertake, or presume, to advise the Court that no limitation whatever can legally be imposed on the new entrant in the face of its prior decisions.

It is more reasonable to conclude that this Court assumed that the FTC would acknowledge and accept the previous decisions squarely holding that some restraint may be imposed on a new entrant if it is not unreasonable, and use that as a starting point in investigating the permanent plan.

This the FTC did not do, but instead, flatly maintained that any plan that limited a new entrant at all was an unreasonable restraint of trade, directly contrary to the previous rulings of the Fourth and Fifth Circuit Courts of Appeal. Obviously, the FTC does not feel that the prior decisions of this Court are binding upon the FTC and further feels that this Court should reverse itself on this well settled point.

The District Court had no choice but to reject the advice of the FTC based on any such premise.

It is conceded that this excess of unused and unneeded space is a direct result of allocating selling time solely on the basis of floor space, which gave rise to a building contest, and is the principal evil that the Association was attempting to arrest by the amendment of its by-laws on March 12, 1962, and which the District Court dealt with in its Order of June 16, 1962, fixing the allotments of selling time for the 1962 sales season and in its Order of March 6, 1963, promulgating a permanent plan for controlling the allotments for the sales seasons of 1963 and subsequent years.

However, nothing but complete chaos could result from any such radical procedure as undertaking to uproot and undo everything that has developed on the Danville market over a period of some thirty years or more. It is impossible to "turn back the clock" and try to decide this case on the basis of the situation that existed before the overbuilding occurred and arrive at any fair or workable result.

Admittedly under the application of the "rule of reason," the older warehousemen cannot be permitted to exercise their rights in total disregard of the rights of a newcomer, but they are not without some rights in the matter and, by the same token, rights cannot be accorded a newcomer which are in total disregard of the rights of the older warehousemen.

These Appellees assert that any "solution" of the problem existing on the Danville market which does not use the existing situation as a starting point and work from there, is purely theoretical—a "paper solution" only—which if rigidly applied would certainly disrupt a large and important segment of the economy of the southeast, resulting in irreparable damage to the farmer, the public and those engaged in the trade. Such a "solution" would be like the

situation in which the operation was a success, but the patient died.

The District Court had no choice but to deal with the situation on the Danville market as he found it at the commencement of this litigation.

The Matter of Expertise

It is respectfully submitted that the FTC's approach in making its recommendations in this case indicate that it does not fully comprehend all of the peculiar aspects of the tobacco marketing business. The suggestion arises that the FTC is inclined to place a greater value upon theory than upon practice. In its reports in this case it has firmly embraced what it deems to be the ideal to the exclusion of what is, in practice, possible or workable. It seems to believe that new wine may be forced into old skins without causing any disastrous results.

It seems permissible to oberve that the FTC might have used the "wrong end of the telescope" in viewing this case. The problems presented in this case cannot be fairly solved when only viewed from afar. The expertise necessary to recommend a workable plan which will be fair to all parties can only be acquired through long and broad experience in the milieu of the tobacco trade. It is not believed that the gentleman or gentlemen who prepared the FTC reports in this case can lay claim to any such wide and varied experience, as to the tobacco trade. It appears that he or they, might have overlooked the fact that what may be a fair and workable plan in one trade or industry might be wholly unsuitable in another—particularly the trade or industry involved in this case.

It is respectfully suggested that the District Court, and the 4th Circuit Court, already have had the benefit of the

best obtainable expertise to handle the matter in hand in the person of Mr. Fred S. Royster, who was aided by a competent and disinterested attorney, both of whom had had broad experience with the workings of the tobacco market.

Mr. Royster's marked knowledge in tobacco marketing was demonstrated in his testimony given in this case prior to his having been appointed Master and afterwards. He had testified in a number of previous cases and had been recognized as a reliable authority on tobacco auction marketing and the conditions existing on the various tobacco markets. See Rogers v. Douglas Tobacco Board of Trade, 244 F. 2d 471, 473 (5th Cir. 1957).

While the District Court itself, unaided, could not be expected to have evolved an acceptable plan, it could and did evolve an acceptable plan after having had the best advice obtainable anywhere in the tobacco business.

None of the parties are entirely satisfied with the District Court's rulings in this case, but they believe them to constitute a reasonable and fair effort to resolve a most difficult and troublesome problem existing on the Danville market and are willing to accept them with as much grace as possible for the common good. If one single party to this suit had been completely satisfied with the District Court's rulings, that in itself would have been proof that the rulings were not fair and reasonable. The situation was such that it was impossible to arrive at a solution that would please everyone, or indeed anyone, concerned.

It is understood that the opinions of the FTC are generally given weight, but in the present case the opinions of Mr. Royster and his counsel are entitled to be given at least as much weight. The FTC is of course not a court, but rather a governmental agency from whose decisions an aggrieved party may appeal to the courts.

Neither the District Court nor counsel in this case are ungrateful for the efforts of the FTC performed at the invitation and direction of the 4th Circuit Court of Appeals. All parties concerned share the view that all possible help should have been enlisted in solving the problems in this case. However, with all due respect to the FTC, its recommendations simply did not prove to be the help that it was thought they might have been, and the District Court was therefore justified in not accepting them.

Analysis of FTC Recommendation

While the expert knowledge and experience of Mr. Royster, the Special Master, (as pointed out by the Fifth Circuit Court of Appeals in *Rogers* v. *Douglas Tobacco Board of Trade*, 244 F. 2d, 471, 473) is undenied, neither the District Court nor the litigants had even the vaguest idea as to what knowledge or experience the employee of the FTC, who wrote the report and supplement, had in the tobacco business. No evidence was taken by the FTC representative, no survey of the market was conducted and no hearings were had whereby the suggestions of the FTC advisory could be subjected to the test of logic, experience, or criticism. In fact, the first advisory was so vague and so filled with ambiguities that the knowledge of the author of the report came under serious question. When the requested supplemental report was submitted by the FTC, the illogical conclusions of the author made it clear that the author was a mere theorist without any practical knowledge of the interworkings of the tobacco business.

Little could be added to the coldly logical dissection of the FTC recommendations performed by Mr. Royster in his "Report and Recommendation" as to the FTC reports. Here Mr. Royster points out that the FTC recommends

a complete redistribution of selling time among established warehouses, which have made no complaint about their allotments. This would simply upset the balance which has been established in the market by purely artificial means, giving some warehouses selling time which they have not requested and taking the selling time from others who have had no responsibility for the over building problem. So, rather than taking the market as it existed at the time that Bryant-Buckner entered it, the FTC now seeks to create complete chaos in a well ordered business by rearranging the selling time on a purely theoretical basis.

Next, as Mr. Royster pointed out, a new entrant would come into the market with a bonus of selling time. That is to say, that the new entrant would receive more piles for a single unit than would be allowed existing warehousemen for the same amount of space.

In short, the entire report is shot through with gross inequities, illogical theory and a complete lack of knowledge and understanding. All of which cries out that the author lacks any firm understanding of marketing problems.

The most glaring inequity suggested by the FTC, however, is its overall treatment of new entrants in relationship to the established warehousemen, who have built the Danville market. Here the FTC would take the market back to the very evil which everyone agrees should be remedied —that of allotting selling time on a floor space basis, modified only to the extent that it virtually precludes the existing warehouseman from retaining his relative position in the market. Such a plan would not be in the public interest because it encourages wasteful building. Such a plan would be grossly unfair to existing warehousemen who would have to surrender their selling time to any new entrant without any effective way to recoup it.

In short, the FTC proposal is to permit any new entrant to come into the market with a single unit of warehouse on a full parity with existing warehouses. The selling time thus assigned to the new entrant is deducted pro-rata from the existing warehouses. If an existing warehouse finds that it cannot economically operate with its reduced selling time, it can only acquire more selling time by building more space; however, in building more space to survive in the market it is at a complete disadvantage. If it has one unit in the market it gets only 75% credit for a second unit, 50% credit for a third and 25% credit for the fourth unit. This is obviously an invitation to everyone who can build a warehouse to come into the market and dismember the existing warehouses. New warehouses would mushroom in the market, while the older warehouses would molder in ruin because their life blood has been sapped away by the new entrants. Such a plan would simply accentuate the very evil which the District Court has sought to remedy—the wasteful building of unneeded warehouse space, and millions of square feet of unused and unnecessary warehouse space would be constructed.

The unfairness of the FTC proposal to existing warehouses is shocking. It must be remembered that tobacco markets do not just happen—they come into existence and expand through the efforts, energies and promotion of the warehousemen. The Danville market has been developed into at least the second largest flue cured market in the nation by the efforts of its present warehouse interests. Now the FTC proposes that any person who has made no contribution to the market should be permitted to come into the market, build a warehouse, and receive the same credit for the first unit of warehouse space as any of the existing warehouses. The only place from which the selling

time allotted to the new entrant could come would be from the existing warehouses. Up to this point the FTC has taken us back to the old and inequitable floor space plan. But now, to accentuate the inequities, the FTC would penalize the very warehouses, whose personnel built the market, by reducing the credit which they might receive for new construction, giving only 75% credit for a second unit, 50% credit for a third unit and 25% for a fourth unit. Such an unfair plan rewards the warehouse which has participated in promoting the market by rendering it powerless to compete for selling time with the newcomer who has done nothing for the market, and so the old warehouses are defenseless as opportunists swarm into the market to drain off their selling time and wreck them financially.

Here the farmer, for whose convenience the warehouses exist, has no appreciable opportunity of selectivity. He must go to the warehouses which have the selling time. As the selling time of his preferred warehouse flows to newcomers in the market, he must follow the selling time, no matter how little knowledge the newcomer has of selling tobacco or what accommodations are offered him.

Another evil which would arise by opening the Pandora's box of the FTC would be the reduction of the buyers' efficiency by the dissolution of existing consolidations and partnerships and the entry into the market of a multiplicity of new interests. Through the consolidation of warehouse interests in the past, the selling time is utilized in the fewest geographical locations as possible, so that the least amount of time will be wasted by the buyers in traveling from warehouse to warehouse. Under such a plan as proposed by the FTC, there would be an immediate dissolution of consolidations and a division of the selling time

by existing interests in an effort to divide themselves into the smallest possible units for self preservation against the favored newcomer to the market. This would mean that sales would be held in every warehouse in the market so that so much time would be wasted by the buyers in traveling from warehouse to warehouse that it would be impossible for the buyers to buy the 8,800 piles daily allotted to the market.

It is hard to believe that the Congress ever intended that such inequities should grow out of the Sherman Act, which was designed to promote commerce rather than stifle it.

Just why the warehouse interests, which developed and promoted the market should be penalized and the new entrant, who has contributed nothing to the market, should be given preferential treatment, is difficult to understand. The author of the FTC report has certainly indulged in a strange brand of logic.

It was also apparent that the system of allotting selling time on a basis of floor space endangered free trade and tended to create monopolies in the market. The warehouseman with the economic power to build vast warehouses could squeeze his competitors out of the market, garner up the selling time and sell the 8,800 piles for the farmer on his own terms.

The plan recognized the concept of free enterprise, in so far as it can be recognized in a business which of necessity must be strictly regulated and coordinated. During that period which follows the peak of the selling season, when the farmers' demands for selling space does not exceed the allotted 8,800 piles per day, the market reverts to free enterprise, and the farmers can then be selective as to the warehousemen with whom they sell their tobacco. During this period some warehouses sell fewer than their allotted

piles. This creates additional time for the buyers to buy a larger number than those allotted in another warehouse. This time unused by a warehouse, with fewer than its allotted number of piles on the floor, is known as "free time," and is utilized then by warehouses with more than their allotted number of piles on the floor. At this stage in the selling season, the warehouses are operating in free competition with one another, and the farmer then makes his selection of warehouses on a basis of facilities and service.

The plan credits the industrious and enterprising warehouseman with any increased sales resulting from the use of "free time," and he will then be entitled to an increase in his allotment of selling time in the next marketing season not to exceed 8%. Thus, the Royster plan rewards the industrious warehouseman for his extra efforts. This provides the machinery for the constant shifting of selling time to the warehouseman who provides the best facilities and renders the best service to the farmer, so long as he does not resort to unfair practices in inducing farmers to bring tobacco to his warehouse.

We must assume that the Congress intended that the Sherman Act should promote commerce rather than deter it. We must assume that the Sherman Act was designed to permit a reasonable regulation of trade where it is in the best interest of commerce, rather than prohibiting any regulation of trade and thereby bringing on commercial chaos.

Because of the perishable nature of tobacco, because of the limitation upon the number of tobacco buyers in a given market, because of the limitation upon the length of the selling season, because the limitation upon the number of piles of tobacco which can be sold in a day, because of the

limitation upon the redrying facilities of the buying companies, and because of the limitation upon the number of government graders in the market, there must be reasonable regulations imposed upon the processes of selling tobacco which necessarily promote commerce in tobacco by avoiding chaotic conditions which would destroy commerce in tobacco. It has been recognized that reasonable regulations are necessary to promote the orderly sale of tobacco, and such regulations have been promulgated by the Bright Belt Tobacco Association and by the local boards of trade, and voluntarily accepted by, farmers, warehousemen and manufacturing companies.

When one considers the number of factors which limit the sale of tobacco, it is apparent that reasonable regulations are necessary to promote the efficient sale of tobacco. The necessity for coordinating the functions of the farmer, warehouseman, buying companies, government graders and redrying facilities within the framework of limiting factors of time and quantity is apparent, and it is apparent that any appreciable interference with this finely balanced coordinating process could throw the entire system into chaos.